
THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES

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WITH
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FOREWORD

The outstanding development in the law in the present century has, beyond any doubt, been the growth of innumerable administrative agencies. They have flourished in both the national government and in the states in peace and time of war alike. The volume of subordinate legislation promulgated by them exceeds by many times the corresponding additions to the statute books and the number of their decisions is so vast as to dwarf, in comparison, the output of the traditional courts. Exact comparisons are impossible, for much of the legislative and judicial output of these administrative bodies, particularly in the states, is not officially published.

The fact that it is not only difficult but actually impossible in many instances to determine what is the existing law of the administrative agencies, or even what the internal organization of particular agencies is, would constitute grave defects in any system of law. These defects, if not popularly inveighed against as much as certain other characteristics of the administrative agencies such as the combination of the prosecuting, legislative and judicial functions, the lack of independence of the initial trier of the facts, and the limitations on judicial review, are, nevertheless, fundamental shortcomings. A system of law that is not only unknown but to a considerable degree unknowable can scarcely be called civilized; it is, in truth, unworthy of an ingenious people.

Due in considerable part to two world wars, the field of administrative regulation has broadened enormously and the number of administrative agencies in state and nation has grown apace, so much so that few lawyers can even

enumerate them. Indeed, one federal agency which annually disbursed billions of dollars, the Office of Dependency Benefits, although created in 1942 by an act of Congress, failed for several years to find its way into either the *United States Government Manual* or the *Congressional Directory*.

To fulfill their varied functions, the administrative agencies have been endowed with a wide variety of procedures and sanctions by legislative enactments. In the exercise of these functions one of the marked tendencies in certain agencies has been to ignore the fundamental procedural safeguards that are essential to the preservation of private rights. This has been particularly true where judicial review has been curtailed by legislative enactment or by judicial deference to the administrative bodies. In their zeal to enforce the statutes, there has been a tendency all too often to overlook the wisdom embodied in Mr. Justice Brandeis' observation that "In the development of our liberty insistence on procedural regularity has been a large factor."

The long battle for the achievement of procedural regularity in the Federal administrative field culminated in the enactment, without dissenting voice in the Congress, of the McCarran-Sumners Bill, which was signed by the President on June 11, 1946. The Act, while relatively short, is a closely integrated piece of legislation. It is quite impossible to understand it section by section or sentence by sentence; it may be comprehended only in its entirety, and must be interpreted in the light of its legislative history with due regard to antecedent statutes, decisions, and practice.

The Federal Administrative Procedure Act marks the beginning of a new era in administrative law. The Act has been aptly described as the most important statute affecting the administration of justice in the federal field since the passage of the Judiciary Act of 1789. The impact of the new law has been felt by the federal administrative

agencies and the attorneys who practice before them. Since the passage of the Act the various boards, departments, and commissions affected by the Act have been at work revising their procedures and promulgating new rules and regulations in accordance with its provisions.

The Institute, the proceedings of which are reported herein, was planned for the purpose of informing the bar of the profound changes that have been made and are being made in the administrative process of the Federal Government. The Institute was designed to give an opportunity to government personnel, attorneys at law, and the faculties of law schools to hear outstanding experts discuss the Act and describe its application to the more important federal administrative agencies. In the initial stages of the operations under the Act, it is of special importance that the widest possible publicity be given to the steps now being taken to bring uniformity and order out of the chaos which was formerly administrative law.

This volume is now offered to the public with the hope that it will be of genuine service in explaining an act which otherwise might be misunderstood, particularly in its application to specific agencies. We should be ungrateful if we did not again express our appreciation to the distinguished participants in the Institute, both lecturers and audience, who, together, made possible this book.

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April 7, 1947

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LEGISLATIVE BACKGROUND OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT

ARTHUR T. VANDERBILT

I

THE year 1946 was marked by the passage of three very important pieces of legislation in the field of administrative law—the Legislative Reorganization Act,¹ the Federal Tort Claims Act,² and the Federal Administrative Procedure Act.³ The last mentioned of these Acts has been aptly described as the most significant and far-reaching legislation in the realm of federal judicial administration since the Judiciary Act of 1789.⁴ It is the purpose of these remarks to place the new Act in its proper historical setting, leaving to succeeding speakers the analysis of the Act, a critique of it and the study of its impact on the more important federal administrative agencies.

First of all, in seeking to orient the Act in the field of administrative law, it is worth while to observe what, in concentrating our attention on the federal administrative agencies and the modern view of administrative law, we are otherwise all too likely to forget: administrative law in the original and proper sense of the term as defined by Goodnow, the pioneer American scholar in the field, is "that part of the law which fixes the organization and determines the competence of the authorities which execute the law, and indicates to the individual remedies for the violation of his rights."⁵ In that sense administrative law not only dates

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¹ Pub. L. No. 610, 79th Cong., 2d Sess. (1946) approved Aug. 2, 1946.

² *Ibid.* Title IV.

³ Pub. L. No. 404, 79th Cong., 2d Sess. (1946) approved June 11, 1946.

⁴ (1946) 32 A. B. A. J. 377.

⁵ The Principles of the Administrative Law of the United States (1905) at 17.

back to the Year Books but it is still an integral and substantial part of the common law. By means of the extraordinary legal remedies—*habeas corpus*, *quo warranto*, *certiorari*, *mandamus*, prohibition—and the equitable injunction, not to mention suits for damages, every subordinate official was held to his appropriate sphere in the body politic as well as to the proper exercise of his power within that sphere to the end that there may be what the English have called the Rule of Law and what we have customarily referred to as “a government of laws and not of men.” These writs or their modern statutory substitutes, to which must now be added the recent remedy of the declaratory judgment, still serve their ancient purposes and to an extent undreamed of by most law students, whose only law happens, unfortunately for them, to be law school law. As Maitland said, speaking in lectures on Constitutional History of England delivered in 1888:

If you take up a modern volume of the reports of the Queen's Bench division, you will find that about half the cases reported have to do with rules of administrative law; I mean with such matters as local rating, the powers of local boards, the granting of licenses for various trades and professions, the Public Health Acts, the Education Acts, and so forth. Now these matters you cannot study here; they are not elementary, they are regulated by volumes of statutes. Only do not neglect their existence in your general conception of what English law is. If you do, you will frame a false and antiquated notion of our constitution. That constitution does not now-a-days consist merely of king and parliament, privy council, courts of law and some purely executive officers, such as sheriffs, obeying their commands. We have changed all that since the first Reform Act. The governmental powers, the subordinate legislative powers of the great officers, the Secretaries of State, the Treasury, the Board of Trade, the Local Government Board, and again of the Justices in Quarter Sessions, the Municipal Corporations, the Guardians of the Poor, School Boards, Boards of Health and so forth; these have become of the greatest importance, and to leave them out of the picture is to make the picture a partial one-sided obsolete sketch.⁶

⁶ Maitland, *Constitutional History of England* (1908) at 505-506.

The practical importance, even today, of administrative law in the traditional sense is just as important as it was when Maitland spoke and it cannot be ignored in any realistic study of government. Examples of administrative law in this original sense still abound in the federal reports, though they are naturally much more frequent in the states. Even suits for damages against public officials persist: only last year the United States Supreme Court held that the federal courts had jurisdiction over a suit for damages against agents of the Federal Bureau of Investigation resulting from alleged unlawful searches and seizures in violation of the Fourth Amendment and from alleged false imprisonment in violation of the Fifth Amendment.⁷

Currently, however, particularly in the federal field, a different and narrower definition of administrative law is in wide use. Administrative law, according to the Attorney General's Committee on Administrative Procedure, is the law applicable to agencies which have "the power to determine, either by rule or by decision, private rights and obligations."⁸ It contemplates agencies exercising not only executive powers but subordinate legislative or judicial powers or both. It is to such agencies with broad commingled powers rather than executive agencies pure and simple that the new Federal Administrative Procedure Act is primarily addressed.

The term "administrative law" is also used loosely to refer to all of the law made by administrative agencies and officials by rule or regulation as well as by decision or announcement of policy, but this use of the term is popular rather than legal. In its essence administrative law, either in its traditional common-law sense or its more recent meaning as relating to agencies exercising commingled powers of investigation, prosecution, rule-making and adjudication, relates to procedure and remedies rather than

⁷ *Bell v. Hood*, 327 U.S. 678, 66 Sup. Ct. 773, 90 L. ed. 758 (1946).

⁸ Final Report of the Attorney General's Committee on Administrative Procedure (Sen. Doc. No. 8, 77th Cong., 1st Sess. 1941 at 7.

to substance. It would be humanly impossible for anyone to know the federal administrative law in the popular sense; it is decidedly possible since the passage of the Federal Administrative Procedure Act for any competent lawyer to comprehend federal administrative law in its technical, legal sense.

II

The Federal Administrative Procedure Act owes its existence to the phenomenal growth of the administrative agencies. The Final Report of the Attorney General's Committee on Administrative Procedure⁹ traces the origin of three agencies to the First Congress, finds eight more coming into existence before the Civil War, six others, including the Interstate Commerce Commission, in the ensuing period to the end of the century, nine more from 1900 to the end of World War I, and a like number from 1918 to the beginning of the Great Depression, and 17 more from 1930 to 1940—51 agencies in all, of which 22 are outside the regular executive department and 29 within.¹⁰ World War II utilized or evoked a host of agencies, many of which came within the meaning of an administrative agency as defined by the Attorney General's Committee.¹¹ Of these agencies 9 antedated 1940,¹² 15 were created in 1940,¹³ 44 in 1941,¹⁴ 48 in 1942,¹⁵ 28 in 1943,¹⁶ 19 in 1944,¹⁷ 19 in 1945,¹⁸ and 20 even in 1946¹⁹—in all 202 emergency agencies in addition to the 51 peacetime tribunals.

⁹ *Ibid.* at 7-11.

¹⁰ *Ibid.* p. 8.

¹¹ See note 8 *supra*.

¹² 1942 Annual Surv. Am. L. pp. 211-212.

¹³ *Ibid.* pp. 212-214.

¹⁴ *Ibid.* pp. 214-221.

¹⁵ *Ibid.* pp. 221-228.

¹⁶ 1943 Annual Surv. Am. L. pp. 172-175.

¹⁷ 1944 Annual Surv. Am. L. pp. 281-284.

¹⁸ 1945 Annual Surv. Am. L. pp. 340-341.

¹⁹ 1946 Annual Surv. Am. L., article on "War Powers and Their Administration."

Nor does the number of administrative agencies tell the whole story. The vast increase in civilian employees from 1,703,099 in January, 1942, to 3,649,769 in November, 1945,²⁰ reflects the vast increase in jurisdiction and functions of the administrative agencies. Each successive administrative agency, moreover, under the grant of rule-making power in its enabling act, developed its own peculiar procedure, most of which, to be sure, followed in the main accepted patterns with minor but, to the practitioner, troublesome variations.

It may be helpful to trace the movement for administrative reform in England. There, as in the United States, the growth of the new administrative order has been the subject of sharp attack. There the leadership in the conflict was taken, not by, as in this country, the organized bar, but by the Lord Chief Justice and some of the members of the teaching profession.²¹ In 1929 Lord Chief Justice Hewart of Bury published *The New Despotism*,²² a slashing attack on the bureaucrats, whose creed he forcefully stated for them:

1. The business of the Executive is to govern.
2. The only persons fit to govern are experts.
3. The experts in the art of government are the permanent officials, who, exhibiting an ancient and too much neglected virtue, "think themselves worthy of great things, being worthy."
4. But the expert must deal with things as they are. The "four-square man" makes the best of the circumstances in which he finds himself.
5. Two main obstacles hamper the beneficent work of the expert. One is the sovereignty of Parliament, and the other is the rule of law.
6. A kind of fetish-worship, prevalent among an ignorant public, prevents the destruction of these obstacles. The expert, therefore, must make use of the first in order to frustrate the second.
7. To this end let him, under Parliamentary forms, clothe himself

²⁰ 1944 Annual Surv. Am. L. p. 265; 1945 Annual Surv. Am. L. p. 323.

²¹ Robson, *Justice and Administrative Law* (1928); Port, *Administrative Law* (1929); Allen, *Bureaucracy Triumphant* (1931).

²² Lord Hewart of Bury, *The New Despotism* (1929).

with despotic power, and then, because the forms *are* Parliamentary, defy the Law Courts.

8. This course will prove tolerably simple if he can (a) get legislation passed in skeleton form, (b) fill up the gaps with his own rules, orders and regulations, (c) make it difficult or impossible for Parliament to check the said rules, orders and regulations, (d) secure for them the force of statute, (e) make his own decision final, (f) arrange that the fact of his decision shall be conclusive proof of its legality, (g) take power to modify the provisions of statutes, and (h) prevent and avoid any sort of appeal to a Court of Law.

9. If the expert can get rid of the Lord Chancellor, reduce the Judges to a branch of the Civil Service, compel them to give opinions beforehand on hypothetical cases, and appoint them himself through a business man to be called "Minister of Justice," the coping-stone will be laid and the music will be the fuller.²³

Nor was he alone in his views. In *Bureaucracy Triumphant*²⁴ Professor C. K. Allen of Oxford, reviewing this work and Dr. F. J. Port's *Administrative Law*,²⁵ sustains the Lord Chief Justice's philippic, in essence, by concluding:

We remain unconvinced, then, of the necessity for specialist tribunals and a specialist administrative law. Unless we are prepared to admit that the whole constitutional centre of gravity has moved from the legislature to the executive; unless we are willing to be governed not by ourselves through our representatives but by officials who are responsible to no electorate; unless, in short, we are disposed to revise the whole theory and practice of the constitution which has so long been our boast; unless we are prepared to go thus far, then what is most urgently needed, and what is in no sense beyond practical possibility, is to make administrative powers as responsible *de jure* as it is efficient *de facto*. And this we believe will be done only by means of a wholesome body of administrative law developed in harmony with the traditional principles of the general legal system.²⁶

It has been the fashion in certain circles in this country to belittle the Lord Chief Justice's broadside, but it is inter-

²³ *Ibid.* at 13.

²⁴ Allen, *Bureaucracy Triumphant* (1931).

²⁵ Port, *Administrative Law* (1929).

²⁶ See note 24 *supra*, at p. 105.

esting to note that the rumors of the publication of his book led Lord Chancellor Sankey to appoint an able committee with Lord Donoughmore as chairman to investigate the legislative and judicial powers of ministers and to report on safeguards "to secure the constitutional principles of the Sovereignty of Parliament and the Rule of Law." The Report of the Committee on Ministers' Powers, published in 1932,²⁷ lists fifteen important recommendations for changes under delegated legislation²⁸ and eleven more under judicial or quasi-judicial powers.²⁹ After quoting at length from the Lord Chief Justice's work, the Report concludes:

Our Report draws attention to certain parts of that machinery which are capable of improvement, and certain aspects of its working where specific safeguards are needed. At the same time we say deliberately that there is no ground for public fear, *if* the right precautions are taken. None the less the public should be grateful for outspoken criticism, even if exaggerated and we think that the critics whose warnings—and it may be attacks—led up to our investigations performed a useful service.³⁰

It is significant to note, however, that Sir Cecil T. Carr, writing his *Concerning English Administrative Law*³¹ in 1941, states that the recommendations of the Committee have received scant attention and is able to record only four slight changes looking toward compliance with them.³² The direct effect of the Report of the Committee on Ministers' Powers has been negligible. If its conclusions are sound—and they never have been questioned—there must have been much more than smoke to justify the Lord Chief Justice's attack. In "Law and Orders," published in 1945, Professor C. K. Allen has returned to the attack in a scathing indictment of the British bureaucracy in wartime, a book which American lawyers, interested in liberty, would do well to read.

²⁷ Report of the Committee on Ministers' Powers, Cmd. 4060 (1932).

²⁸ *Ibid.* pp. 64-70.

²⁹ *Ibid.* pp. 115-118.

³⁰ *Ibid.* at 7 (italics ours).

³¹ Carr, *Concerning English Administrative Law* (1941).

³² *Ibid.* pp. 29, 55, 174-175.

Quite different has been the course of events in this country. Here the law schools, by and large, have neglected administrative law despite the pioneer work of Goodnow at Columbia, Freund at Chicago, Frankfurter at Harvard and Dickinson at Pennsylvania.³³ As late as 1934 only forty of the eighty law schools belonging to the Association of American Law Schools gave any course in the subject, and most of these courses were elective or postgraduate, interesting a select, but numerically negligible, group of students.³⁴ Despite the agitation of the American Bar Association and the press for administrative reform, by 1938 only 52 out of 82 taught the subject.³⁵ Law teachers, like lawyers generally, cannot easily give up their age-old intellectual habit of seeking all wisdom in the volumes of decisions reported in the English language, of provincial indifference toward the way other nations have solved similar problems, of a peculiar sort of unspoken contempt for legislation as a type of inferior law until such time as it shall have been construed by the courts, and of reluctance to apply the disciplines of economics and sociology to legal problems.

The credit for the reform of administrative procedure, as well as for saving the nation from the recall of judges, the recall of judicial decisions, and thirty years later from the court-packing plan, and for bringing about the exercise of the rule-making power in the federal courts in both civil and criminal cases, must be given to the practicing lawyers of the country working through the American Bar Association. A special committee on administrative law was appointed in 1933. Its annual reports have been veritable

³³ Goodnow, *Comparative Administrative Law* (1893), *Politics and Administration* (1900), *Principles of the Administrative Law of the United States* (1905), *Selected Cases on Government and Administration* (1906), *Selected Cases on the Law of Officers* (1906); Freund, *Cases on Administrative Law* (1911, 2d ed. 1928), *Standards of American Legislation* (1917), *Administrative Powers Over Persons and Property* (1928), *Legislative Regulation* (1932); Frankfurter and Davison, *Cases and Other Material on Administrative Law* (1932, 2d ed. 1935).

³⁴ "One Hundred Years of Administrative Law"; *Law: A Century of Progress, 1835-1935* (1937) p. 122.

³⁵ (1938) 8 *Am. L. School Rev.* 1036-1037.

mines of information in a field where, until the Attorney General's Committee made its report, information was by no means easy to obtain.³⁶ In its successive studies the committee has also advocated various methods of solving the problems of administrative law.

As the work of the special committee progressed, other agencies lent a hand. In 1937 the President's Committee on Administrative Management recommended the complete separation of investigative-prosecuting functions and personnel from adjudicating functions and personnel.³⁷ In 1938 and 1939 the committee on administrative agencies and tribunals of the Section of Judicial Administration of the American Bar Association made its reports dealing particularly with state administrative law and submitted a model bill in that field.³⁸ The final report of the Attorney General's Committee on Administrative Procedure appeared in 1941 and submitted two bills, one by the majority, the other by the minority.³⁹ The legislative bill of the minority which was approved by the American Bar Association has furnished the substance of the new Federal Administrative Procedure Act. The National Conference of Commissioners on Uniform State Laws worked from 1940 to 1946 on a model state administrative procedure act which has been finally approved by the Commissioners but not yet published.⁴⁰ There have been several state reports, notably the Jacobs-Vogel report in New Jersey in 1941,⁴¹ the Benjamin Report in New York in 1942,⁴² and the Report of the Judicial Council of California on Administrative Agencies Survey

³⁶ Final Report of the Attorney General's Committee on Administrative Procedure (Sen. Doc. No. 8, 77th Cong., 1st Sess. 1941) pp. 25-33.

³⁷ Report on Administrative Management in the Executive Branch of the Government (1937).

³⁸ (1938) 63 A. B. A. Rep. 623-656; (1939) 64 A. B. A. Rep. 407-442.

³⁹ See note 36 *supra*, pp. 191, 217.

⁴⁰ National Conference of Commissioners on Uniform State Laws Handbook for 1943, p. 226 et seq. contains a draft as revised to September, 1943. The 1943 draft has been again revised but the final revision is not available in printed form.

⁴¹ Study of State Administrative Agencies in New Jersey (1941).

⁴² Report on Administrative Adjudication in the State of New York (1942).

in 1944.⁴³ All of this has been grist for the federal legislative mill.

III

The first federal proposal for general administrative procedural reform seems to have been the Norris bill in 1929 for a separate administrative court.⁴⁴ A proposal for an administrative court of appeal was also made by Dr. Port in England the same year.⁴⁵ In 1936 the Logan bill⁴⁶ proposed the establishment of a Federal Administrative Court, having both trial and appellate divisions. Sessions of the trial division were to be held anywhere in the United States. The appellate division was to review all issues both of fact and of law and was to be permitted to take additional testimony. Its decision was to be final, subject to review by the Supreme Court by writ of certiorari. The Logan bill was drafted along the lines of the earlier recommendations of the special committee on administrative law of the American Bar Association. In 1936 the special committee approved in principle the establishment of a Federal Administrative Court but withheld approval of any pending bill. In 1937, however, the special committee abandoned its advocacy of the administrative court and since that date has concentrated on the improvement of administrative procedure. Senator Logan and Representative Celler introduced bills providing for the administrative court in 1938. Hearings were held on the Senate version of the bill, but no action was taken.

The first of the so-called administrative law bills was S. 915, introduced in the first session of the Seventy-sixth Congress in 1939 by Senator Logan. Representative Celler introduced an identical bill in the House. This Logan-Celler bill represented the first introduction in Congress of the American Bar Association legislative proposals on this sub-

⁴³ Tenth Biennial Report to the Governor and Legislature of California (1944).

⁴⁴ S. 5154, 70th Cong., 2d Sess. (1929).

⁴⁵ Port, *Administrative Law* (1929) p. 358.

⁴⁶ S. 3787, 74th Cong., 2d Sess. (1936).

ject, the bill having been formally approved by the Association in January, 1939. S. 915 was reported by the Senate Committee on the Judiciary, with amendments, on May 17, 1939. It was passed by the Senate on July 1, 1939, but was restored to the calendar by adoption of a motion to reconsider. Congressman Walter at that time introduced H. R. 6324, which was practically identical with the Senate bill as amended and passed.

Meantime the Attorney General's Committee on Administrative Procedure had been appointed in February, 1939. It requested the committees of the Congress to defer action on any of the administrative law bills until after the completion of the Committee's work. H. R. 6324, which came to be known as the Walter-Logan bill, was reported to the House, with slight amendments, on July 13, 1939. It was passed by the House on April 21, 1940, and sent to the Senate. Reported to the Senate on May 9, 1940, it passed, with amendments, on November 26, 1940. The Senate version was agreed to by the House on December 2, 1940. This bill was vetoed by the President on December 17, 1940, the veto message stating that it was deemed advisable to await the report of the Attorney General's Committee, at that time engaged in its study of the administrative agencies. The President's veto was sustained by the House.

Both the majority and the minority of the Attorney General's Committee had set forth model bills, and bills patterned after these models were introduced into Congress in 1941. The Senate Judiciary Committee held extensive hearings on three bills⁴⁷ but suspended consideration in that summer in view of the imminence of war and the then declared national emergency.

In 1944 interest in the administrative processes was revived, particularly in view of the actions of some of the wartime agencies, and the bill approved by the American Bar Association was introduced as S. 2030 and H. R. 5081. No action was taken on these bills but a revised and sim-

⁴⁷ S. 674, S. 675, S. 918, 77th Cong., 1st Sess. (1941).

plified bill, S. 7 and H. R. 1203, the McCarran-Sumners bill, was introduced in 1945. This bill received much attention. First, the Committees on the Judiciary of the Senate and the House requested the administrative agencies to submit their views on the bill in writing. Then in May the Senate Committee published the bill as introduced and a tentatively revised bill in parallel columns. Next the administrative agencies and all other interested persons were invited to comment on the revised text. Then these comments were analyzed by the Committee's staff and a second pamphlet was issued in June, 1945, setting forth in parallel columns: (1) the text of the bill as introduced, (2) the text of the tentatively revised bill previously published, (3) a general explanation of provisions with references to the report of the Attorney General's Committee on Administrative Procedure and other authorities, and (4) a summary of views and suggestions received. The Attorney General designated representatives of his Department to obtain and to correlate the views of the administrative agencies and to discuss the matter with other interested persons. Thereafter a bill was drafted. The Attorney General submitted a favorable report on the bill. Most significant are the committee reports and the Congressional debates on the bill as it passed the Senate on March 12, 1946, and the House on May 24, 1946, without opposition in either house. President Truman signed the bill on June 11, 1946.

The painstaking work of the Committees on the Judiciary of each house, as incorporated in their reports, and the cooperation of the Attorney General did much to account for the unanimity of legislative opinion on what had for years been a controversial issue, but there can be no doubt that the desire of the members of Congress to pass the bill on the subject, even though it might fall short of the perfect statute that individual members of Congress might desire, was an important factor in eliminating any possible opposition. In the debates in each House it was made amply clear that if the new Act should in anywise fail to protect individual

rights, Congress was prepared to return again to the consideration of the problems of administrative procedure.

IV

Nor did the Act satisfy everyone outside of the Congress. There are many who favor a complete separation of the investigating, prosecuting, and rule-making functions from adjudication, such as has long existed in the instance of the Bureau of Internal Revenue and the Tax Court. The minority of the Attorney General's Committee took the position that:

in cases involving factual issues between the investigating or prosecuting agents of the Government and private parties, the same agency should not issue complaints, prosecute the proceedings thereunder, and adjudicate the cases where there is no opportunity for the citizen to have a readjudication by an independent tribunal. This is the typical situation where the prosecutor-judge combination is criticized. In practice, it takes two forms—either the agency initiates proceedings on its own motion, or private parties make complaints and the agency then makes those complaints its own (as often happens in prosecuting attorneys' offices). But these differences in form are not significant. Here we think complete separation, with adjudication by wholly independent agencies, is normally to be preferred.⁴⁸

The President's Committee on Administrative Management was of the same view:

Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself.⁴⁹

The minority of the Attorney General's Committee conceded that there were obvious difficulties in the separation of functions in areas of administrative law in which the prac-

⁴⁸ See note 8 *supra*, at 208.

⁴⁹ See note 37 *supra*, at 40.

tice of administrative discretion is large, as in passing upon licenses or applications for benefits.⁵⁰ It also stated that an administrative agency may properly adjudicate cases between two private parties, rather than between the Government and a party as in the instance of the reparation cases of the Interstate Commerce Commission.⁵¹ In testifying before a subcommittee of the Judiciary Committee of the Senate, I added a third exception to the doctrine of complete separation of functions: one of the chief reasons justifying the Congress in setting up administrative agencies with commingled powers is that Congress does not have the detailed information in the field it is seeking to regulate to enable it, even if it had time at its disposal, to draft the necessary regulations. This detailed knowledge can best be accumulated through one body conducting investigations, prosecuting complaints, adjudicating cases and making rules. This does not, however, justify the commingling powers *ad infinitum*, but only for limited periods varying from two to three to five years while the Commission was accumulating experience for competent rule-making.⁵² Subject to these exceptions, in the opinion of many, the reasons for complete separation of functions are still controlling. The present Act represents the best compromise that adherents of this school of thought believed themselves able to obtain.

On the other hand, there have been fears expressed by some that a general act governing administrative procedure might interfere with the flexibility of the administrative process or, indeed, to quote the agitated language of some, "put it in a strait jacket." In this connection it may be well to recall similar misgivings of a century or more ago when courts were consolidated, law and equity merged and the forms of action abolished, but they proved groundless. It may be well to remind ourselves that chancery practice has

⁵⁰ See note 8 *supra*, pp. 207-208.

⁵¹ *Ibid.*, p. 208.

⁵² Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 77th Congress, 1st Sess. (1941) on S. 674, S. 675, S. 918 pp. 13-14.

more than once required revision to save itself and that the Star Chamber, though it served an extremely useful purpose in preserving law and order in a turbulent period—indeed, Maitland suggests that it saved the English constitution⁵³—brought about its own undoing by its excesses. Executive justice, we need always to remember, tends to be heady. Whichever school of thought one may adhere to, it is conceded on all sides that the present Act is in line with the general tendency, illustrated in the judicial field by the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to simplify and streamline the rules of adjective law.

⁵³ Maitland, 2 *Collected Papers* (1911) 496.

ANALYSIS OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT

CARL MCFARLAND

As lawyers, we, of course, ought to be interested in the background of important statutes and particularly, since it is the subject of the discussion here, of the new Administrative Procedure Act. It finds its roots in no one place and it was drafted by no one person. Its origins lie in the basic conception of law and justice which we have inherited, in which we believe, and by which we live.

The motive which led to its adoption may surely be defined, if that should be necessary for historical purposes. The events of the last fifteen years in that connection are also significant in demonstrating the need, the determination, and the character of what has been done. But our purpose at this time is a more immediate one. We are interested in practical affairs, not only for today but for the years immediately to come.

In the first place, this is not the time to discuss the terms of the Act or its detailed application. The lectures in this series after today will presumably examine such things. For lawyers the time is past for abstract discussions or general descriptions. The statute was exhaustively explained during its progress through the national legislature. The official documents relating to it have been officially compiled and published (see Sen. Doc. No. 248, 79th Cong., 2d Sess., 1946). They may be obtained from the Government Printing Office. Excellent and even more detailed commercial publications are available to everyone. The series of articles which began in the American Bar Association Journal more than a year ago traces the immediate development of the Act, its structure, its intent, and the beginnings of its operation.

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There are, however, some larger aspects which should be discussed by the profession and which may be helpful in the opening of this series of lectures. They should be brought out before we, as individual lawyers or as a profession, become immersed, as we so often do, in the detail of the daily bread-and-butter business of the law.

It is my purpose here to discuss three types of things: First, those relating to the approach of the lawyer who practices, or intends to practice, in the field of federal administrative law. Secondly, the basis for the interpretation and the use of this particular piece of legislation—or rather the technique for its use. Third, its structure. Fourth, its general significance in the field of American justice.

I

As to the first of these—the matter of practice—there are several indispensable preliminaries. The first is the need of the individual lawyer to study. In this field lawyers have borrowed the layman's attitude, that they know all about it. They speak in generalities. They know a few byways, one way or the other. Not only must the lawyer study this subject but his study must be real and intense. Of course, some lawyers gain by ear and some lawyers gain by eye. Those who gain only by ear may lose out in this field. It is not only necessary to read but in so doing to use the official literature on the subject. One of the amazing things is the almost universal turning to unofficial literature on this subject. It is almost regarded as bad form to look at an administrative statute if you can turn to some secondary source and find out what somebody thought the statute said. We read learned books about administrative law, many of them written abroad under foreign systems. But we seem to have a constitutional aversion to reading our own administrative law.

What are the official sources? The official sources of administrative law in this country are the statutes of

legislatures, the rules, the orders, the procedures, and the reports of administrative agencies. To be sure, you cannot start with volume I of the ICC reports and read them all. But there are some parts that must be read. And, in the field of federal legislation, the first thing to read is Senate Document 248 of the 79th Congress—a small publication, about three-quarters of an inch thick, which contains all the official statements about the statute which is the subject of this course of lectures. There is the report of the Attorney General's Committee on Administrative Procedure (Sen. Doc. No. 8, 77th Cong., 1st Sess., 1944), now out of print.) You have heard Dean Vanderbilt speak of the Lord Chancellor's report, and it is an excellent report. In this state, you have the study made by Commissioner Benjamin. Then, of course, do not neglect the commercial books in the form of official material, chiefly loose-leaf, which are really the books of administrative law in a practical sense all over the country.

Furthermore, it is practically useless to read literature on only part of the field because, if you do not understand the whole system, what you think you know about one part of it will undoubtedly be delusive. That is one of the reasons why the official studies, such as the Attorney General's Committee Report and the Benjamin Report, are so much preferable to any book or any article. The people responsible for those productions were under mandate to study the whole subject. And no matter how ill-equipped they might have been when they began, when they got through they began to see its inter-relations and the fact that it was a system they were describing.

After all, administrative law is not a field of law like contracts or real property; it is a system of justice. To understand administrative law, as every practitioner should if he attempts to really work at it, requires the application of all of the things that are regarded as basic to courses in jurisprudence or in American government, because they all fit in. The very concept of the judicial

function, the things that you assume in law school when you study common law subjects, are articulated in the field of administrative law. In that field you discuss why it is that a judge wears a robe; why it is that he sits apart from the prosecutor. You must understand the "why" of many things that are not discussed in the usual legal subjects.

One last word on the question of study. It must proceed to the point where a person feels at home, not merely at home in the glib sense of knowing some of the words but until a person feels at home to the extent that he knows what they mean and where they do not apply and what the exceptions are. The field becomes like grammar—you understand it and you speak it without having to refer to the rules.

Of the several things in the lawyer's approach, the first is study. The second is to be comprehensive about it. If a lawyer intends to be a general practitioner in administrative law, as distinguished from a man who simply knows a lot about the requirements of a given agency and can file papers and take what comes, then it is necessary to know the nature of administrative operations, their different classes, and to be able to apply them across the board to all kinds of agencies. Some lawyers now begin to understand that there is rule making (or legislative functions) and that agencies exercise judicial functions (which we call adjudication in the field of administrative law), but it is surprising how many who have come to that elementary degree of knowledge are unable to distinguish what is one and what is another when they find them in some agency under different words. And the words are never uniform because all of these things have grown up without thought, without plan, and without design.

For example, if you were a bright young law student walking down the corridor in your law school and saw a set of books labeled "Treasury Decisions" you would probably pass them by if you were looking for Treasury

regulations, because the word "decisions" usually means determinations in particular cases. But in the Treasury Department they call a general rule a "decision." Similarly, if you read the Administrative Procedure Act and find that it calls a judicial decision by an administrative agency an "order" and you pick up an administrative document and see at the top the word "order," do not be surprised if you find that it is a general regulation because nine times out of ten it will be. And, if you see something called a "directive," do not be surprised if it is either the one or the other.

Your studies should also be comprehensive subject-wise. Of course, as you begin to study functions you will run up against subjects like railroads or radio or food. Certainly the student ought to take one subject of regulation and know what the general set-up is before he really understands what administrative justice means. And the practitioner, when faced with a given case on a given problem, ought then to take that as his occasion for finding out what the entire field of that subject is. If a lawyer has a labor relations case, he cannot operate as he does in the field of contracts and say, "Yes, this matter involves a matter of consideration. I will go to my code. I will look under 'Consideration.' There is my answer." The reason he can do that in an ordinary case is that his law-school education and his general practice have given him a background, and the law has been well catalogued. But in the administrative field it will be necessary for him to review the subject before he dare assume in his own mind that he knows the right approach. We lawyers learn a lot of things that we can almost do in our sleep. We would like all practice to be that way. But this is one field which is different because of its nature, because of its complexity, and because of its fluidity and change.

A lawyer has still another thing to learn which is perhaps not strictly administrative law, if he desires to understand federal administrative law. The ordinary state prac-

itioner is almost as ignorant of the federal legal system as he is of federal administrative law. The federal legal system has a good many quirks in it that are fundamental, and they are fundamentally different from state law. The differences are particularly significant in the administrative law field. In the first place, legislation is by far the most important factor in the field of administrative law. Law schools have hardly brought themselves to teach legislation. Yet legislation creates agencies. It gives them their powers, their procedural patterns, and also shapes the role that the courts shall play in connection with the given subject. The way in which legislation does those things is technical. Federal legislation, particularly, is drawn in terms cryptic to the person who is not familiar with it. There is a wholly different system of interpretation in the federal field as compared with the states. Theoretically there is no federal common law, so that a statute rests on its own four corners whereas in practically every state a statute is interpreted more or less as a part of the general body of the law. Furthermore, in the federal field there is the whole business of so-called legislative history—documents which accompany statutes, which are an authoritative gloss upon them, which add the detail, and which are important in the interpretation and application of the statute.

We have been misled as a profession by some of the propaganda in the field. The field is supposed to be a non-technical one and we assume that it is non-technical. But when the burden rests on the private party, it is very technical. And the technicalities are not spelled out. You must know them as a result of your studies, not only of the particular agencies involved but of the general course of administrative law in your particular jurisdiction.

II

The interpretation of this particular statute is a matter for some careful preliminary thinking. "Interpretation"

is something basic and does not relate merely to the meaning of a word or a phrase. There are many basic points in this field. There is time here to illustrate but a few of them.

First take the history of the statute. There is already growing a falsely applied history which proceeds in this fashion: It is said that in a given year such and such was proposed. A few years later such and such was proposed, let us say, in the matter of evidence, and such and such a bill had such and such language in it. And, therefore, the language that finally found a place in the statute is somehow explained by what was suggested ten years before. That is a false interpretation of the history.

But in the history we can find many important things. You can read the entire report of the Senate Judiciary Committee, the entire report of the House Committee, and except for one short paragraph not a word is said about why the statute was thought necessary. This situation makes all the more important what was said in the one short paragraph, which relates to the standardization and the simplification of administrative law and procedure.

The one stated purpose is to secure a degree of standardization. Now, of course, it has become a tenet with some people that nothing should ever be standardized. But it is undeniable that a very important purpose of the statute was to standardize and simplify. Some people have called it codification. The Attorney General has used the word "codification" in several of his addresses. Of course, "codification" technically might mean restatement without change of existing law. "Codification" in this particular connection is often used as meaning a restatement of best practice. But the standardization and the simplification that the Judiciary committees meant were legal standardization and legal simplification.

In addition to simplification and standardization, legal limitations were imposed. The idea of limitation comes

hard to many people but after all that is what law is. As you proceed through the official documents you will find time after time, so that there can be no doubt whatever, that the purpose was limitation of procedures, of powers, of methods, of sanctions, and of remedies. People are to be informed, under Section 3, of what they are required to do. Under Sections 4, 5, 6, 7, and 8, they are to be given procedures with a limited range of differences. Under Section 9 the sanctions against them are restricted. Under Section 10 agency action is limited by judicial review.

But it would be a mistake to talk about simplification and limitation as though those understandable words were the whole thing, because you can read no page of the history without discovering that there was a desire for reform. There certainly is no doubt that, in passing this statute, there was a desire for reform. Otherwise why would there have been so many bills, so many hearings, so many studies, so much talk? Congress does not legislate for the fun of it, or for the purpose of placing a statute on the books, or to give publishers a few more orders for law books.

However, there certainly can be no denial that Congress meant to recognize administrative justice. Recognition is just as much a part of the statute as reform. They were very sincere people who desired no administrative procedure act for the very reason that it would recognize that administrative justice was a valid and going institution. People who think like that have the philosophy that administrative law—administrative rules, orders and processes—should be considered a sort of subsidiary or second-class law. They have a point. Let us say that they are on the extreme right as compared with the extreme left. Nevertheless the fourth thing you can draw from the history here is that it is a recognition of the administrative process, not only expressly but by absolutely necessary implication. This is important because our prior difficulties have been in large part those of the spirit in this field.

No one, of course, wishes to make so grievous an error as to say that administrative law is something new. But, in a sense, with this statute it comes of age in the federal field.

III

In addition to matters of background and history, the general structure of the Administrative Procedure Act is important. It is easily overlooked by one in a hurry to get down to details.

First, the matter of definitions. The definition of "agency" is significant. Many people have assumed that agencies are determined by their form—that we have departments, boards, independent offices, etc. That seems perfectly logical. It is almost like the old gentleman of consequence down in South Africa who said that it was perfectly obvious that the world was flat. It seems to be perfectly obvious in many people's minds that agencies are as they superficially appear. That is not so in the federal government. You may have a Department of Labor and yet, if you scrutinize the Department of Labor closely, you may find tucked away in it an agency completely autonomous. You may find a commission made up of eleven men, but you may find that they are not necessarily the agency because any three of them can exercise powers. There are all types of complications in the word "agency," at least in the federal government. A solution had to be found. It illustrates the problems of the structure of government in the federal field, and it has a number of other significant points so far as administrative law is concerned.

Take the definition of "rule and rule-making." It is an out-and-out statement that agencies may and do legislate. Take the definition of "order" and "adjudication"—agencies do and may exercise judicial functions. Then you have the important definition of "license" which shows that in the federal field licensing takes many forms. And the same with the definition of "sanctions and relief."

Now, pass to the fundamental requirements in Section 3. Essentially, what Section 3 says is that a party who is subject to administrative processes must be informed of procedure and of organization. If there was anything that the Attorney General's Committee was unanimously agreed on, it was that subject. The majority and minority collaborated and drafted the chapter that described the confusion in the field of administrative information. The chairman of the Attorney General's Committee appeared before the Senate to say that the then situation was completely "baffling." Why is administrative information so important? It is important, in addition to the usual reasons, because the procedures differ from traditional procedures. One of the reasons given for the institution of administrative justice is that it finds new and more efficient ways of doing things. A corollary of new methods is to let the people know what the new methods are.

It is unnecessary for us to know about the organization of courts. Why? Because the judicial organization is minutely described by statute. But administrative agencies are supposed to be flexible and they certainly change in their organizational patterns rapidly. The persons who must proceed before them must know where to go and when. We must know a lot of things in the administrative field that we do not have to know about in the judicial field. And yet, whoever drew the first set of administrative rules undoubtedly had in mind the rule book he grew up with in the county courthouse.

Section 4 of the statute speaks of rule-making, the methods of administrative legislation. Section 5 speaks of certain procedures in the field of formal adjudication. Sections 7 and 8 respecting hearings and decisions require close study. Section 9 deals with sanctions. These are typical lawyers' subjects.

Section 10 deals with judicial review. One of the greatest practical difficulties about the field of judicial review is the real meaning of terms. It is said that judicial review

embraces only questions of law, and so it does. But there are many kinds of questions of law. Matters of judicial competence are the interpretation of statutes and of constitutions, yet sometimes people are surprised that a matter of statutory interpretation would be involved. Sometimes people are surprised that abuses of discretion are reviewable—and yet they are reviewed every day in the courts. Some people are surprised that a matter of procedure is reviewable. Sometimes a court will say that something is not reviewable—by which it means not that it is not reviewable but that no error has been shown or that the error is too slight.

The examiner situation under Sections 7, 8, and 11 is a very interesting one, which unfortunately we have not the time to discuss. Nor do we have time to examine the vitally important interrelations of one section with another. Definitions, procedure, and review are always inter-related. The information section affects the procedure section. Notice is related to hearing. Informal preliminary procedures are sometimes related to the formal ones. Rules are related to orders. Sanctions are very directly related to problems of evidence. The status of the examiner is important in many problems in the administrative field.

IV

The last subject is that of the significance of the Act, or how it is not significant. So far the discussions of this subject may have taken a false tack. The discussions have been, "Does it change this or that detail?" That is not the significance of the statute. What the statute does of course is not to be measured by whether it requires an agency to change a rule or whether it solves some special case.

Another false direction of the discussion of significance, and perhaps the most common one, is that relating to litigation. In the first place, if the statute provokes litigation that is no reason for having no statute, because if that

were true we should dispense with a great part of the United States Code. But the truth of the matter is, and it is a very practical thing which many lawyers will not like to hear, that this statute has comparatively little significance in actual litigation. Most agencies in most of their work will comply with it.

Federal agencies are accustomed to following statutes. Agencies will follow statutes where they will not follow a court decision, because after all the court might change on a slightly different state of facts. But if an agency is told to have intermediate reports or issue rules, it will do so. There may be occasions when, through stubbornness or failure to appreciate just what is involved or what is meant, some errors of omission will be made. But by and large they will comply. Many of them will comply, if not gladly, at least without much question. That is one reason why litigation will not be widely important.

Another reason why litigation will not be important is because this statute is one respecting functions and processes rather than details. It is comparable in this respect to the Judicial Code, which lawyers need rarely consult because courts comply with it almost automatically. They do the various things prescribed in the federal Judicial Code, which is their charter. It has great significance, but it is not a handbook for litigation. Similarly, the Administrative Procedure Act is not a handbook for the trial of lawsuits. The Administrative Procedure Act simply sets up a system. It will be accepted; it will pass into our legal system. Five years from now it will be regarded as one of the accepted facts of life.

But there is other significance to the statute. The first is that what is said in it is law; it must be obeyed. Heretofore there have been various administrative practices and procedures. But they were unsettled, whereas under the new Act there are basic requirements. They are matters of statutory law. They are now the law of the land.

One of the most important things about the whole statute is that it is educational. It will at least lead some lawyers to examine its terms, to read other things, to try to become familiar with this field. It will educate particularly the non-lawyer administrator. As a practical matter, a non-lawyer who sits on a board is not apt to ask for much information from his lawyer subordinates. He is impatient or doubtful about judge-made law because he does not understand it. But he will read a statute and, if it says he must do so and so, he will do it. Therein this statute will cut down on litigation because it will cut down on errors that come about from that intensely personal and practical situation. And the measure will be educational for legislators, too, because it is a blueprint they have accepted and which they may rely upon in place of attempting to write the whole thing over and over again on the spur of the moment whenever an agency is created or given new functions. This matter of education is one of the most important things in government. It is as important as new programs, because the success of the latter depends upon public acceptance of methods as well as of policies.

Another way to put the situation might be to say that the statute is a chart instead of a code, because it furnishes some general guides that solve some of the problems and some of the fears that people have had since time immemorial in the field of government. It is something on which confidence and a legal system may be built. It is thus a means for government to secure good public relations. It is a means of achieving order in place of fear or chaos or a blind surrender to what people call statism. It is well worth what has gone into it if it achieves but a little of what it can achieve.

But, this statute will not fulfill its full function until the bar has become just as familiar with the field of administrative law as it is with other fields of the law. The bar will serve itself as a profession and lawyers will serve

themselves individually if they will attempt to learn the subject. When that happens, the clamor will quiet down. People will ask what all the shouting was about back between 1930 and 1950. And it will become a footnote in some large legal history when the American Holdsworth appears in a century or so.

The discussion on this address was combined with the discussion on Mr. Blachly's address and is to be found on p. 63.

CRITIQUE OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT

FREDERICK FRANK BLACHLY

I wish to attack the Federal Administrative Procedure Act on three different counts: (1) the way it was foisted upon the people of this country by the American Bar Association; (2) its complete inapplicability to modern economic and social conditions; and (3) its detailed provisions.

THE WAY IT WAS FOISTED UPON THE PEOPLE

For the past ten years or more the American Bar Association, realizing that it has been losing much of its traditional practice by the administrative process, has been carrying on a campaign over the entire country to depreciate that process. Under the catch-words "administrative absolutism" it has tried to convince the people: (1) that the functions bestowed by law upon their administrative authorities were carried out without procedural safeguards to guarantee that their rights were protected, and without proper recourse to the courts; and (2) that the public could not obtain information as to what governmental authorities were doing. While one must admit that ten years ago it required a certain degree of effort to become familiar with the procedure of some of the administrative authorities (as I well know from gathering them all together), they did exist. The Code of Federal Regulations has made them more easily available. The Federal Register legislation means that practically every administrative requirement which might affect the individual adversely is published. In addition almost every authority publishes in pamphlet form its rules of procedure. Finally, unofficial sources make these regulations available. They

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are gathered together in Pike and Fisher's Service on Administrative Law, in one usable collection which is kept up to date. They may also be found in the Administrative Law Section of the Commerce Clearing House.

If one will take the trouble, as I have done,¹ to analyze all of these procedures in the regulatory field, he will see that although they vary in details, they all have guaranteed the fundamental features of a fair hearing, wherever rights may be affected. Practically every one of them provides for the initiation of proceedings based upon the type of moving papers applicable—a charge, a complaint, a notice of an inquiry, an application for an exemption, an application for a license, a claim, an authorization, a prayer for relief, application for adjustment, petition for an amendment and so on. In nearly all cases provision was made for an answer, and for procedural rules incidental to the hearing, such as motions, requests, and petitions. The hearings, while usually held before trial examiners, were carefully safeguarded. The presiding officer was given adequate power to conduct the hearing properly, to rule upon motions and requests, to set the time and place of hearing and to adjourn it from time to time, to administer oaths and affirmations and to take affidavits, to issue subpoenas, to call and examine witnesses, to take or to order the taking of depositions, to admit or exclude evidence, to hear oral arguments of law and fact and to take measures to maintain order.

Almost all the rules provided that anyone having a definite interest might be a party, and that he could be represented by himself or counsel. Adequate provision existed for the issuance of subpoenas. While there were a wide variety of conditions under which applications for subpoenas were granted or denied, it can not be said that any interested party would be unable to protect his rights by failure to secure witnesses and the necessary docu-

¹ See "A New Approach to the Reform of Regulatory Procedure," (1943) 32 Georgetown L. J. 325.

ments. Rather elaborate rules existed in respect to depositions and interventions; all giving parties the necessary rights to defend their interests.

Most of the agencies had detailed rules applicable to various features of the hearing procedure, such as requests for a hearing, the order of a hearing, formal and informal hearings, the time and place of the hearing, the failure to appear, waiver of hearings, the order of procedure, the duties of hearing officers, the rules of evidence, the examination of witnesses, oral argument, standards of conduct, the closing of the record, the transcript of testimony, the examiner's report and the transfer of the case to the deciding authority.

In nearly all instances oral arguments were permitted and briefs could be presented. In practically all cases there was a provision for a transcript of the evidence. Although there were differences in respect to the report of the officer who presided at the hearings, these were minor variations due to the different theories or necessities of the administrative authorities, which in no way injured the rights of those appearing before the administrative bodies. Many of the rules of procedure provided for further hearings, rehearings, rearguments and reconsideration of or modification of the order. Many of these rules of procedure, such as those of the ICC, had been built up after much discussion with all those interested and were the product of much experience.

While one might disagree with the omission of a particular rule or the inclusion of some particular statement, or disagree with the theory underlying such a procedural factor as the nature of the report, etc., it could not be said that there was not an adequate procedure before practically every authority. These procedures varied according to the nature of the case and the action to be taken, but the Supreme Court repeatedly declared them adequate in connection with one agency after another. Either the members of the American Bar Association were in igno-

rance of these adequate procedures, or they deliberately misrepresented the facts.

I have made a careful examination of the approximately 3,500 statutory authorizations to take administrative action. As a result of this examination, I can say categorically, and can prove it by chapter and verse, that in practically all cases where rights are involved the statutes provide for judicial review. In those cases where no review is provided, the type of action is either one over which the courts have historically refused to take action, where they could see no rights involved, whether there was no case or controversy involved, or one where Congress itself (for what it considered good and sufficient reason) has failed to provide for review, or has specifically excluded review. In many instances, particularly in respect to the regulatory functions, Congress has limited the scope of review, by providing that the fact-finding of the administrative agency, if supported by evidence or testimony, should be conclusive.

The facts of the matter, in respect to both procedure and judicial review, entirely controvert the doctrine which the Bar Association propagandized as "Administrative Absolutism," and which it used as an argument in persuading legislative bodies to place particular kinds of curbs upon administrative action.

There was room for improvement through considerable unification and simplification of administrative procedures. It might have been possible to establish an administrative code based upon a functional approach to the problem, so that there might reasonably have been four or five different kinds of procedures, depending upon the nature of the subject matter handled. This could have been done by the government agencies cooperating under the guidance of an agency, such as the majority report of the Attorney General's Committee recommended, continually examining into the detailed operations of the administrative process. But I must pass on to the next point.

In the second place, I wish to object very seriously to the type of agency that was responsible for the initiation and final passage of this measure. Administrative procedures, and methods of control over administration, are far too important matters to be entrusted to private parties who may have and usually do have a definite interest in having as many pegs as possible upon which to hang a case, and as many ways as possible of blocking, overthrowing or lessening the effect of administrative action. Just as the due process of law clause of the fifth and fourteenth amendments were used during the past century to defeat necessary social legislation, the shackles on administrative procedures and controls may be used during this century to defeat adequate administrative action. All of the professions of such a group to the effect that they are trying to protect the poor innocent citizen against the mighty Leviathan the government, cannot remove the odor of self-interest. The Solution of the Attorney General's Committee should have been followed, i.e., an Office of Federal Administrative Procedure should have been set up, which after proper study should have developed an adequate plan of administrative legislation and adjudication, with a logical relationship to the courts.

Again, I wish to object to the way in which the Act was railroaded through Congress during the past year. No hearings on the Act were held in the Senate, and the so-called hearings in the House were a farce. Three proponents of the American Bar Association appeared, not upon the specific bill S.7 which was finally passed by the House, but upon a variety of bills. In particular, Mr. McFarland, who was charged with the task of elucidating the matter of administrative procedure before the Judiciary Committee of the House, confined himself not to S.7 but to generalities.

The Chairman: You are going to discuss the general subject?

Mr. McFarland: Yes.

The Chairman: Rather than the individual bills?

Mr. McFarland: I am not particularly interested in "A B C" bills.²

Only two members of the administrative authorities were represented at the hearing: Dr. Splawn and Mr. Aitchison, both of the Interstate Commerce Commission. No representatives of the public interest were called. (It is true that Mr. Rosenbaum was given a few moments to plead that others than lawyers might be able to appear before administrative authorities.) Several persons, including myself, asked to be heard in the public interest and appeared at the House Judiciary Committee Room at the time set. However, the statement or excuse was made that the Committee could not meet that morning because of a morning session of the House, but that we would be called back shortly. We were never called back. I telephoned asking once more for a chance to appear, but no time was ever set. Thus the bill went to the two chambers without any seeming opposition, and with no adequate information upon which the members of Congress could base their judgment. If ten or twelve opponents of the measure had had a chance before the Committees, at least there might have been indications of the serious objections to the measure.

Because the bill was technical, because there was a tremendous feeling against wartime controls, because of lack of adequate information as to what were the objections, because the members of the Houses were absorbed in great national and international problems, and possibly because of the mistaken impression that this was the Walter-Logan Bill in a more becoming dress, there was practically no debate on the measure in either House. There were some explanations, and a few questions, but no real debate. Thus was passed one of the most important bills ever before Congress, with the least opportunity for hearing and the least Congressional debate probably ever devoted to a bill of such significance. It is no answer to say that

² Administrative Procedure Act, Legislative History, 79th Cong., 2d Sess. (1946) at 72.

there were hearings and debates on previous bills, for it is the particular provisions of the Administrative Procedure Bill which make all the difference in the world regarding its applicability to present-day conditions.

THE COMPLETE INAPPLICABILITY OF THE ACT TO MODERN ECONOMIC AND SOCIAL CONDITIONS

The whole world is in the midst of a profound mechanical, economic, social and political revolution, which is not only changing the lives of individuals in a fundamental way but is refashioning all governmental institutions. This is particularly true of the administrative process in all of its prime factors: organization, the relationship of authorities one to another, distribution of functions, procedures, forms of administrative action, sanctions for the enforcement of administrative action, methods of enforcement, and methods of control over such action.

The functions of the state have ceased to be chiefly of a political, police and revenue nature, and have expanded into many new fields. More and more the state is undertaking great promotional activities, is acting as a proprietor, is performing vast regulatory and managerial tasks, is assuming benefactory and protective relationships to the individual, and is acting as an intermediary between great contesting economic forces through conciliation, mediation, and arbitration.

The proper functioning of these new activities has not only changed the relationship between the state and the individual, but has necessarily involved far-reaching changes in every one of the prime factors of administration just mentioned. No longer will the old political, police and revenue formulas meet the present-day situation. New theories and new formulas must be devised. New types of organization must be established to make the complicated adjustments required in a complex mechanized society.

Let us look at the problem from broad principles of economics and public administration.

A careful examination of the actions of the government as they affect the individual shows that they fall into several distinct classes: (1) Political and sovereign actions; (2) contractual actions; (3) revenue actions; (4) actions of a proprietary nature; (5) promotional actions; (6) protective actions; (7) actions in the nature of conciliation, or voluntary arbitration; (8) regulatory actions; (9) benefactory actions; (10) actions of strictly police nature and (11) actions of a judicial nature. Each of these types of action, carried out by administrative authorities, involves different kinds of relationships of the government to the individual; each is based on a special branch of political philosophy; each has its own legal norms; each has rather specialized administrative factors, such as type or organization, or the relationship of one agency to other agencies; each has its appropriate forms of action; procedures, and methods of making its action effective; each has been subordinated to certain kinds of control.

The beginning of wisdom in respect to the whole administrative process is to realize that these types of action must of necessity affect not only the administrative process itself but the control over it. You cannot reasonably make generalizations by agencies as the Walter-Logan Bill tried to do; you cannot reasonably make generalizations by considering whether or not Congress has provided for a hearing, as the present Administrative Procedure Act attempts to do; you cannot make blind generalizations as to separation of powers. You must look at the nature of the action itself; the economic and sociological purposes, the political philosophy back of it, the legal theory connected with it, the nature of the administrative process necessary to make it effective, and the methods of control that are applicable. From these viewpoints I wish to discuss in a broad way the problems connected with the chief types of administrative action, at

which the Administrative Procedure Act is aimed: regulatory action, benefactory action, police action, disciplinary action and judicial action as handled by administrative authorities.

Regulatory Action.—Modern economic and political theory is questioning the automatic nature of the competitive system, is ceasing to believe that unrestricted competition alone can be regarded as the sole organizing and regulatory principle of national economy, and is turning to governmental intervention of various sorts as a method of synthesis and control. This is true, for example, in the fields of transportation, banking, securities and security exchanges, communications, aviation, heat, light and power, foods, commodity exchanges, the tariff, and labor relationships. To carry out these various interventions Congress has established powerful independent authorities, which are charged with the making of the complicated adjustments necessary in a complex society. They act to obviate the evils of monopoly, to prevent cut-throat competition, to adjust tariff rates, to apportion opportunities such as the use of grazing lands or air waves, to keep the financial system in balance, to aid in the establishment of better communication and transportation services, to see the minimum wage scales are applied under certain conditions, and so on.

These are no mere police authorities acting under the narrow police formula; they are powerful social agencies established to adjust economic and social relationships in the general interest. The beginning of wisdom in respect to any one of the prime factors of the administrative process is to recognize this fact. Nothing could be further from the truth than to regard them as merely slightly elongated twigs of the executive branch of the government. They act, and must act, to a considerable extent as combined administrative, legislative and judicial authorities. The complications of modern economic life and the need for control mean that in a very real sense these

agencies must share in certain functions that each of the former three branches of the government has traditionally performed. You will say: But is not this just what the American Bar Association feared and dreaded? Is it not this concentration of power at which the Administrative Procedure Act is aimed? The answer is, No. At the moment we must pass on, but I promise to return to the question.

In order to carry out their functions properly the various agencies have generally been given special types of organization, special relationships to other branches of the government, special forms of action, and special ways of seeing that their determinations are carried out. They have been given or have been allowed special types of procedure. They are entrusted with a wide variety of special powers and techniques, such as the power of investigation, making special reports to Congress, the power to subpoena witnesses and documents, the power to require depositions; in many cases the right to issue licenses and grant certificates of public interest, convenience and necessity, the right to hold hearings, to establish and enforce accounting and reporting systems, to make procedural regulations under which they operate, to make rules and regulations having the force of law, the right to invoke judicial aid in order to make their determinations effective, and particularly (as different from a court), the right to initiate action. These powers are exercised through a multitude of purely administrative actions, such as examinations and checks by field agents, the keeping of a multitude of records and accounts, the approval of requests, the fixing of boundaries and zones, the establishment of rates requested by private agencies, the approval of loans and stock issues, establishing of standards, the issuance of licenses and other documents of authorization. In other words, these agencies not only have wide administrative, legislative and judicial powers, but they use such powers primarily in carrying on broad administrative

activities. Their legislative and so-called judicial activities are only incidental to their main function which is administration.

Here, then, are authorities which at first glance, appear almost coordinate with the other branches of the government, which are working for the general public interest, upon which have been placed grave responsibilities, and which in the exercise of their functions must use a high degree of discretion and judgment. They find facts and upon these facts make very significant social judgments. But the facts which they are dealing with are not as simple as to decide whether Rastus really stole that chicken. They are facts in respect to general economic and social situations, such as are considered by the legislature itself: what are the causes of airplane accidents; what kind of stock prospectus will protect the investor; what is the reasonable cost of board, lodging and other facilities; what is the value of property for rate-making purposes; what rate of return will produce a reasonable compensation for services devoted to the public interest; what factors of an accounting system are necessary in order that they may properly control; are there factors sufficient to justify an extension or withdrawal of public facilities? These and hundreds of like facts must form the basis for the determinations of such agencies. They are seldom absolute facts, but in most cases are only relative to a complex situation. In many cases they involve a prophesy; in many cases they involve variables and averages; in many cases they involve a judgment. The procedures for the gathering of such facts, upon which to base a judgment either as to new rules and regulations or as to specific orders can certainly not be limited to the procedure used in a criminal case or even a civil suit. The information to be gathered is basically informational in nature, no matter what may be the procedures for securing it. The procedures should be those most suitable for bringing out the relevant social and economic factors involved,

in order that the authorities may properly carry out the functions entrusted to them. Economic and statistical material may be far more significant than mere legal material. Any attempt to place their fact findings in the same category as those of a civil or criminal suit, is disastrous to their wide social and economic functions. They should, it is true, have rules of procedure, but these should be such as to enable them to carry out their functions adequately. In respect to their great regulatory functions, the courts should (as in fact they are doing more and more) recognize that these authorities must often exercise a wide degree of discretion and especially that there is no such close relationship between the facts brought out at the hearing and the final determination as exists in the civil and criminal law.

It is instructive to compare what the Supreme Court itself has said in respect to the relationship that should exist between these great regulatory authorities and the courts, and what the American Bar Association says should exist (through the provisions of the Administrative Procedure Act). Speaking for the Court in the *Pottsville Broadcasting Co. Case*, 309 U. S. 134, 60 Sup. Ct. 437, 84 L. ed. 656 (1940), Justice Frankfurter said:

The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from these. To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. . . . Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the convention judicial modes for adjusting conflicting claims—mores whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have

power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes of the whole nation in the enjoyment of facilities for transportation, communications and other essential public services. These differences in origin and function preclude wholesale transplantation of rules of procedure, trial and review which have evolved from the history and experience of courts. . . . But to assimilate the relationship between lower and upper courts is to disregard the origin and purpose of the movement for administrative regulation and at the same time to disregard the traditional scope, however far reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorted lenses of inapplicable legal doctrine.

In the *Waterman Steamship Corporation Case*, 309 U. S., 206, 60 Sup. Ct. 493, 84 L. ed. 704 (1940), the Supreme Court said:

It is of paramount importance that courts not encroach upon the exclusive power of the Board if effect is to be given to the intention of Congress to apply an orderly, informed and specialized procedure to the complex administrative problems arising in the solution of industrial disputes. As it did in setting up other administrative bodies, Congress has left question of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with a general policy, Congress has deemed it wise to entrust the findings of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress, as a matter of policy, has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act. And, therefore, charges by public agencies constitutionally created . . . that their duly conferred jurisdiction has been invaded so that their statutory duties cannot be effectively fulfilled, raise questions of high importance . . .

In the case of the *United States v. Morgan*, 307 U. S. 183, 191, 59 Sup. Ct. 795, 83 L. ed. 1211 (1939), the Supreme Court said:

. . . In construing a statute setting up an administrative agency

and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Courts and agency are the means adopted to attain the prescribed end, and so far as their duties are designated by words of the statute, those words should be construed so as to attain that end through coordinated action.

In 1908, when Charles Evans Hughes was running for reelection as Governor of New York, while the regulation of public utilities was under debate and the proposal was made that the courts should, upon appeal, try both questions of fact and questions of law, in a speech at Elmira, he said:

And I tell you, ladies and gentlemen, no more insidious assault could be made upon the independence and esteem of the judiciary than to burden it with these questions of administration—questions which lie close to the public interest, and in regard to which the people are going to insist on having administration by officers directly accountable to them.

There are several ways in which the Administrative Procedure Act seriously interferes with these broad regulatory functions of administrative agencies. It provides a fixed hearing procedure instead of a flexible procedure, necessary to meet the different functions that are being carried on. Although the agencies are operating in the public interest it provides that the "proponent of a rule or order shall have the burden of proof" (Section 7(c)). According to the Act, any individual can require the court to hold unlawful and set aside findings and conclusions unsupported by "substantial" evidence. This inherently makes the courts judges of fact findings. It requires a separation of functions and a divorce to a large extent of the trial examiners from the agency, although the regulatory function, there is no legislature, prosecutor, judge complex, because the function, despite its form, is legislative in nature.

On the other hand, much confusion has resulted from a failure to recognize that despite the broad regulatory functions of many agencies, some of the actions which they must perform are not of the general legislative type. Such acts as revoking a license for cause, passing upon reparations, punishing officers, etc., resemble adjudication rather than legislation. The facts upon which such acts are based are specific; they can be proved; the determination can be narrowly confined to the fact finding. As a result, the procedures can be very like judicial procedures and the controls can be the usual controls over judicial types of action.

Benefactory Action.—Within recent years, new theories of governmental activity have developed, leading the state to act not only in a police and regulatory capacity, but toward the development of a positive welfare system of benefactory action. The general purpose of Congress in establishing this benefactory system has been to create and develop a more effective, just and equitable social order. This purpose is served by a wide variety of activities, including assistance to war veterans and their families, federal provision for the aged and those unable to work; payments for injuries caused by the government in its functioning; the establishment of various kinds of insurance; the lending of money; granting subsidies; provision of money to the states, to help them in establishing and maintaining old-age assistance plans, unemployment compensation systems, aid to crippled children and the blind, and systems of child welfare; the making of provision for the sale and use of public lands and the public domain; the granting of patents and copyrights and many other functions of a like nature.

I shall not have time to go into any of the details of these different types of governmental action, except to say that Congress, and the courts have adopted a variety of solutions as to the problem of procedures and judicial review. In most instances only legislative rights are in-

volved; here and elsewhere Congress has used its discretion as to judicial review, prohibiting it in certain instances, providing for it in others, and saying nothing about it in yet others. In some instances the benefit is established in the form of a contingent right; that is, if the administrative authority denies that the individual comes within the contingency, there may be a cause for action; in other instances it would seem to be established upon a pure benefit basis. (See F. F. Blachly and Miriam E. Oatman, "Judicial Review of Benefactory Action," (1944) 33 Georgetown L. J. 1. Within this field a large number of administrative appellate authorities have been established, and these have generally been held sufficient, due as a rule to the slight amount involved, need for speedy settlement, and the absence of the elements of a case or controversy.

What I am anxious to know is how far the Administrative Procedure Act will affect these relationships set up by Congress? Section 10(a) of the Act provides that any person "adversely affected by such action (that is, action not precluded from judicial review, or agency action which is committed to agency discretion) within the meaning of any relevant statute, shall be entitled to judicial review thereof." Section 2(f) says "'Relief' includes the whole or any part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege or remedy; (2) recognition of any claim, right, immunity, privilege, exemption or exception; or (3) taking any other action upon the application or petition of, and beneficial to, any persons." Was this elaborate definition of benefactory action placed in the law merely to write out a dictionary meaning of such action, or was it so placed as to make all reliefs and benefactions subject to judicial review? If the latter is the case, it runs counter to nearly all political, economic and legal theory governing such action, and is contrary to many statutes and court decisions applying to the subject.

Police Action.—In exercising powers over interstate commerce in general, the postal service, shipping, waterways, public property and lands, foods, drugs, cosmetics and explosives, firearms, injurious imports, narcotics, liquor, and the collection of taxes from customs, etc., in the past the administrative authorities have been allowed to use little or no formal procedure or to employ special procedures, such as seizures, confiscation, the destruction of property, or the issue of distress warrants. Because of the particular situations surrounding these types of activities, as well as the inherent danger to the public welfare, or because of the paramount necessity of the government, the courts have never required that there should be a hearing before action was taken; in many cases there was no judicial review; and in other cases it was deemed sufficient if there was a control at some point. In many instances the Congress has not provided for judicial review and the courts have not assumed jurisdiction, since no constitutional or common law right was violated and there wasn't statutory right enforceable by a judicial remedy.

All this seems to be changed by the Administrative Procedure Act, under the provision of Section 10(a) which provides that any person adversely affected by any agency action is entitled to a judicial review, coupled with the provisions called "Sanctions" in Section 2(f). "'Sanction' includes the whole or any part of any agency, (1) prohibition, requirement, limitations, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; (7) taking of other compulsory or restrictive action." The two clauses together mean that all the acts named are subject to judicial review.

By a mere definition, without hearing and without

debate, much of the political and legal theory of Congress and the courts is thus overthrown. In respect to some individual actions affected by the Act there might be room for debate; but to overthrow a patiently built up legal and juridical theory by a mere definition is indefensible. Again, if it is claimed that the full scope of judicial review is not to be applied to such actions (as I have heard learned friends argue in defense of the new law) why, oh why, is the definition included in the Act?

Disciplinary Action.—In a number of circumstances, Congress has authorized administrative authorities to take disciplinary action against those who violate rules and regulations, or the law. The most important of such type of action is the cease and desist order. It is true that here a combination of investigatory, prosecutory and judicial functions may exist. Such a situation probably warrants a separation of functions within the authority itself; or it is sometimes argued that only the prosecutory and investigatory functions should be given to the administrative authorities, while the judicial functions should be exercised by a court. I suppose that the main arguments against the latter procedure might be that to some extent the meaning of the law as to what is unfair competition, etc., must be built up step by step; that probably few business men would wish to have a statute list in particular the unfair methods of competition, provide penalties, and cause violators to be hailed before the courts as criminals. After all, the cease and desist order is much milder.

Judicial Action.—In several circumstances, administrative authorities have been given what amount to almost judicial powers. This is true of the deputies under the Harbor Workers' and Longshoremen's Act, the six authorities which issue reparation orders, the National Labor Relations Board, and certain other authorities and situations. Here the government is not a party. Here there is an adjudication of rights and duties between private parties. There is no problem of the separation of powers, for

the government is doing but one thing, settling private disputes. There are, however, certain differences between such authorities and courts. These agencies do not have the same independence as courts, their members are not appointed for life or good behavior, and they cannot enforce their orders. (The law has made some little distinction in respect to reparation orders.)

As I have tried to point out, the actions of the federal agencies fall into several distinct groups. Each group involves different types of relationships of the individual to the state; is based upon different political and legal concepts; requires different types of organization for its functioning; requires different types of procedures, enforcement methods and controls, and different types of relationship of authorities one to another. I have tried to show that it is true that problems of formal procedure, the separation of powers, and judicial control (except as to taxation) are largely confined to regulatory action, benefactor action, police actions, disciplinary actions, and actions of a judicial nature; and that these actions are so different in nature that they cannot be thrown together in one mass. This has been recognized in the past by Congress and the courts.

The most fundamental theoretical weakness of the Federal Administrative Procedure Act is the fact that it has not taken these essential differences into consideration, in laying down procedures, controls, and an artificial separation of powers.

DETAILED CRITICISM OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT

I shall only briefly criticize in detail some of the other weaknesses of the Act. This will be done under the headings of (1) Information, (2) Procedure, and (3) Review.

Information.—While almost every one would agree that we wish information regarding the administrative process,

the present Act appears to be unreasonable in this respect. In the first place publication in the Federal Register is no real distribution of information. Few persons take the Federal Register. It is simply like putting a needle in a haystack, to place agency procedures along with the multitudinous other material there. Such information should be gathered into a handbook published once a year. It might be so organized that all procedures are placed together, as one finds in Pike and Fisher. To place information regarding the governmental agencies in the Federal Register is to make it unavailable to most people except large concerns and their lawyers, who can afford to subscribe to, keep up-to-date, and find the information wanted. I have had bitter experience myself in trying to find materials in the Federal Register, particularly procedures. It was much more simple to go around to the departments or agencies concerned and get their latest statements, or to depend upon Pike and Fisher's Administrative Law Service or that of the Commerce Clearing House. Since the ordinary person is interested in the procedures and actions of only one or two agencies, it would be better for them to prepare and have available this information than to have it published at a great cost in the Federal Register.

Again, there is an excessive belief in the efficacy of information, when authorities are required to publish many aspects of their operations with which the public is not too intimately concerned. Hundreds of tons of good paper should not be published to tell everyone about the details of each agency, when only a few are interested in any particular agency. Each agency might have a rather detailed outline of the proper way to approach it, so that the particular individual interested might be saved from wasting time, but to publish the whole of such material in a general publication such as the Federal Register appears unwarranted.

There is a further requirement that every agency must, among other things, "currently publish in the Federal

Register . . . statements of general policy formulated and adopted by the agency for the guidance of the public" (Act, Section 3). If (as Mr. Cohen, of the Law School of the University of Nebraska, points out:)

such formulation and adoption of general policy was intended to be merely permissive, it is not very meaningful; if it was meant to be mandatory, it would require the Department of Justice to set forth its policy with respect to the enforcement of such laws as the Civil Rights Act, the Anti-Trust Act, the Anti-Kidnapping Act and all other criminal laws; or the Post Office Department with respect to its policy on second-class mailing privileges; or the Securities and Exchange Commission with respect to the fraudulent sale of securities. . . .

The requirement that "no person shall in any manner be required to resort to organization or procedures not so published," places the trappings of formality ahead of substance. It further places the administration in the position of daily keeping up the publication of its most insignificant organizational shifts and the most minute changes in procedure on the penalty of not being able to operate.

A serious and fundamental change in administrative law is brought about by the provision of the bill for the issuance of declaratory orders by administrative authorities:

. . . The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

The words "controversy" and "uncertainty" are filled with ambiguities. Does the word "controversy" apply only to controversies between private individuals which the administrative authority is settling by the administrative process, as is the case of reparation orders, the settlement of longshoremen's and harbor workers' claims, orders for the payment of money for violation of the shipping act, etc., or does it also apply to controversies between the government and the individual, as in respect to the cease and desist order?

The declaratory order is fraught with many dangers:

1. The answers to questions that would be asked might be made upon a hypothetical set of facts, but action taken by the individual might be somewhat or considerably different from the hypothetical situation.

2. In many cases, as in respect to unfair methods of competition or false advertising, the authority would be practically legislating in respect to a particular individual. The determination made for one individual would in reality be interpreted as a general determination. Once such an order were made, many persons with similar cases might believe that they would come under the order and act accordingly, only to find that special circumstances made their situation so different that their action had been illegal.

3. Again, where the administration is in the position of prosecuting for violations of law, it cannot use its powers of declaratory judgment as a court would, to pass upon the respective rights of individuals in such a case, for it is a party to the case. In such a circumstance the administration is in the position of making a detailed pronouncement as to the meaning or application of an administrative policy which it has already determined to enforce. In a significant way, such pronouncements in respect to a congressional policy might well constitute special legislation. Evidently the detailed application of legislative policy should be made by rules and regulations and not by a declaratory order. The fundamental difficulty with the Bar Association proposal is the fact that they assimilate the administrative authorities to courts judging between the respective narrow rights of individuals, rather than recognize them as administrative authorities carrying out governmental policies. The courts, in their application of the declaratory judgment, have strictly limited themselves to rights, and will not make decisions as to questions of policy. But, by the very nature of the questions which would come before them as administrators, the administrative authorities would have to determine questions of

policy. Unlike the courts, they are not backed up by a long tradition of hesitancy in giving advisory opinions. The reasons which have prevented the courts from giving advisory opinions apply with equal and sometimes even greater force, to the advisory opinions of an administrative body. It cannot be too strongly emphasized that while courts are only adjudicating, the administrative agencies, in most instances where such power would be used, are also administering. While it is true, that the statute permits the agency to exercise "sound discretion," there would be placed upon it extremely strong pressure from special and powerful interests. This would not only seriously interfere with its work, but would also put it in a compromising position. Who in the agency is to have such authority? Evidently, only the whole commission or like agency, thus throwing an intolerable burden upon it.

4. Again, the statute does not protect the declaratory order from abuse, as does the Declaratory Judgment Act. The Administrative Procedure Act gives a blanket authorization to administrative agencies, whereas the Declaratory Judgment Act gives no such unlimited authority to the courts. (For a more detailed analysis of this subject, see F. F. Blachly and M. E. Oatman, "The Federal Administrative Procedure Act," (1945) 34 Georgetown L. J. 417.)

Procedures.—The procedural provisions of the Act do not in any way constitute a well thought out code, in which different types of procedures are made applicable to different types of administrative activities. They cover only a few of some fifty to one hundred factors of procedure which have been developed by statutes, court decision and the practice of regulatory authorities. (For what these factors are and the reasons for them see Blachly and Oatman, "A New Approach to the Reform of Regulatory Procedure," (1943) 32 Georgetown L. J. 325.) The procedures do not take into consideration such important differences as exist between the regulatory function, where the government is attempting to gain information upon

which to act in the public interest; the disciplinary function, where the administrative authority is acting as a court punishing offenders; the issuance of certificates of public interest, convenience and necessity, where the administrative authority is passing upon wide questions of public policy; and the purely administrative judicial function, where the agency is merely acting as a court might in settling disputes between two private individuals.

The procedures established where rules are not required to be made after notice and hearing, are far too complex. In respect to 95% of the some 1,900 authorizations or requirements to issue rules and regulations preparatory to the taking of action, the purpose of such authorization or such requirement seems merely to secure administrative uniformity, and to prevent the lower administrative officers from acting in a discriminatory way. In formulating such rules, which have highly technical applications, the administrative authorities should have complete discretion as to the amount of popular participation to be permitted. (See my Work Materials on Administrative Action in the Law Division of the Library of Congress for a list and analysis of all statutory authorizations.)

The judicialized procedure provided for, in respect to rules and orders which are required by statute to be made after opportunity for agency hearing, attempts to standardize a few of the factors which are now almost always present in the existing rules of administrative procedure. Such standardization would appear highly undesirable, because of the difference in the subject matter handled. For instance, in a cease and desist order case, or the withdrawal of a pension grant for fraud, or the deportation of an alien, the burden of proof might with some degree of plausibility be placed upon the government. But to require the burden of proof to be placed upon an agency under circumstances where it must of necessity exercise a wide discretion, as in the fixing of a rate or the granting

of a certificate of public interest, convenience and necessity, would seem wholly inapplicable.

There is room for doubt whether the decision procedure established by Section 8 of the law is the best for all agencies. Where the determination includes questions of policy, as in respect to general rate increases, or the establishment of abandonment of a pipe line, there is much greater need for close cooperation between the hearing officer and the authority, than there is in respect to a cease and desist order, a reparation order or a compensation award.

The doctrine of the separation of powers provided for in the Act goes on the theory that all governmental action is of a prosecuting and adversary type, with the government as a party. We have shown conclusively that this is not so, in respect to some of the most important functions of the administration. It is not so in rate regulation; it is not so in the granting of certificates of public interest, convenience and necessity; it is not so where the administrative authority acts purely as a court in settling contests between two private individuals, as in reparation, or compensation awards. It is so, primarily in respect to cease and desist orders, and some actions of a police nature. But why burden the administrative process with this altogether unfitting provision in respect to certain types of action, in order to secure a double guarantee of fairness in respect to only a few administrative actions, all of which are already controlled by judicial review? This is only another example of the application of the big black bottle to administration, instead of making a careful diagnosis of the different situations.

The judicialized process of the granting of licenses is both unnecessary and expensive. Such a procedure and review would be particularly harmful in the Department of Agriculture, and would lead to no desirable results that are not now accomplished by the numerous review committees and boards.

Judicial Review.—Practically every definition and state-

ment in the Act has the purpose of throwing under judicial control a great number of administrative determinations not now subject thereto. This can be readily seen from the definitions of "agency," "rules," "rule-making," "orders," "licenses," "sanctions," "reliefs," etc. It can also be seen from the provision subjecting to review every agency action reviewable by statute and every final agency action for which there is no other adequate remedy. (Section 4(e).) It is true that there are a few exceptions. These are: where a statute, as happens in a very few instances (for example, veterans' pensions), expressly prohibits judicial review; and (2) where, by law, agency action is committed to agency discretion. (Section 10.) The expression, "is by law committed to agency discretion," is highly ambiguous. Does it mean that the agency may only use discretion where there is an express statutory statement to this effect, as sometimes occurs? Or does it mean that discretion is implied from the nature of the action? The provisions regarding judicial review seem to take little or no account of the factors necessary to constitute a case or controversy (which is a condition precedent to the taking of jurisdiction by the constitutional courts), the proper relationships of the administrative authorities to the courts, the various relationships between the government and the individual, the limitations due to the nature of the judicial power, the nature of certain types of administrative action, the types of questions involved, the form of the proceedings, the subject matter under consideration, certain types of fact finding, or the legal standing of the individual asking for review.

The conditions under which the courts are to take jurisdiction is a very interesting classification. However, it may be anticipated that the courts, which after all are the final interpreters of their own jurisdiction, will assume or refuse to assume jurisdiction much as they have done in the past. In the meantime, before the jurisdictional questions have been decided, this Act will cause many an

unnecessary suit to be instigated, and perhaps carried through several courts, to the great expense of the government and the individual, and the slowing down of administration at a critical period, from the governmental, social, and economic viewpoints.

One of the serious faults of the Bar Association in presenting this bill, was the fact that it failed to take into consideration the many adequate administrative reviews, particularly of actions over which historically the regular constitutional courts have not take jurisdiction.

When a real administrative procedure act is formulated, it should be drawn up by the government itself. It should not be the product of a private group whose special interests lie in obtaining the maximum amount of judicialized procedure, and the maximum amount of judicial control. It must be based upon economic, political and social reality, derived from an exact and appropriate administrative study of each and every administrative and juridical situation involved. There must be different types of procedure to meet different situations. There must be a well thought out system of judicial review, adequate to meet the different types of situations made reviewable. Information must be provided so that it is readily available, and not hidden in the Federal Register, which only a few have the privilege of seeing. In short, this Act should be recognized as a mistake which must be corrected—and the sooner the better.

The discussion on this address was combined with the discussion on Mr. McFarland's address and is to be found on p. 63.

RESPONSE TO MR. BLACHLY

CARL MCFARLAND

Ladies and gentlemen, I am somewhat embarrassed at this moment because I am reminded of the position of the lawyer who walks into a courtroom to try a case and he finds that respondent is going to represent himself—that is, a lawyer against a layman. I had a case like that out in the Far West, a case of constructive eviction against three elderly maiden ladies who owned a ranch called Runymede. Last week I was in the unusual position of defending a government agency and the party suing the government agency decided to appear *pro se*. The District Judge listened and finally gave the man twenty days to get a lawyer. Of course, I am not the judge here and I cannot order Mr. Blachly to get himself a lawyer. And from what he said I gather he does not like lawyers.

This measure is referred to in the previous discussion as the American Bar Association Bill. The American Bar Association, it would seem, had espoused this thing in the dead of the night, introduced it in Congress in the pale light of the moon, had it signed at the White House before sunrise, and hence is charged with proceeding without notice, hearing, and so forth. All of these assumptions, whether expressed or implied, are completely untrue.

It is true that the American Bar Association supported this measure. It is the profession concerned. It had some misgivings about it and, after discussing the pros and cons for a few years, it decided it had better go along with the general course of action which most of the people had agreed upon was about the right thing.

It always seemed to me very peculiar that schools, and particularly professional schools who are dedicated to the training of experts, persistently refuse to recognize that there are professions and that there are different specialties.

Mr. Blachly assumes, as some laymen assume, that all law is in the public domain. I have read the articles that Professor Blachly and his wife have written, and in a nutshell what he is saying and what he means is that he has worked out in the course of the years a classification of administrative functions and this statute does not adopt that classification. The answer to that, I think, is simple enough. You can tune a fiddle in various ways and still produce very good music. As has often been demonstrated, the question is whether you devise something sound and operative.

The recitation of numerous types and categories which we have heard in different connections may be very useful for some purpose and, of course, may have been useful in drafting an administrative procedure act. Nobody else, in the fifteen years that this matter has been coming alive, has suggested those classifications; not a soul.

It is said there are new things government is doing, and I notice that high on the list is that government is acting as a proprietor. There is not anything new about the government acting as a proprietor, not the federal government. It was a proprietor before it was anything else. It was a proprietor before it was a government. It owned a vast public domain. Much of our administrative law has grown out of the administration of the public domain. A great deal of what is called public land law furnished the basis for much of our theory and practice of federal administrative law.

It is said that conciliation is something new. Of course, although it may seem a far cry now but was not in those days, conciliation was about as important a thing as there was on the frontier. The native tribes were not the innocuous people they are today. If you open the first volume of the statutes-at-large of the United States you will find plenty of laws and procedures about conciliation.

Then I notice through the discussion the use of the term "judicial." There lurks in the use of the term, as we

have heard it earlier this afternoon, two meanings. The Administrative Procedure Act uses "judicial" as meaning one of two typical kinds of operations. The previous speaker has used the term "judicial" to mean procedure. The statement was also made a bit later that these functions, after all, are really administrative rather than legislative or judicial. Of course, the significance of the terms "legislative" and "judicial" is very simple. It simply means the difference between deciding a particular case as a court does, or laying down a general rule as a legislature does. The reason it is necessary to make the differentiation is that, if you are deciding a particular case, for example, in most situations you must call the parties before you by giving them certain kinds of notice and the facts must be established somehow. Differences between the two have been recognized from time immemorial. They are recognized by the Supreme Court of the United States at every term, and it seems a reasonable thing to accept that division as one of the starting points in discussing this subject. But this subject is not as complex as these various categories we have heard would make you believe. It is complex to study because your task as students or lawyers is to break through the tremendous welter of words to find out what it is that people are talking about.

We have heard this afternoon lengthy quotations from various decisions. Quotations are used over and over and over again, not merely by my distinguished friend over here on the right but by all kinds of people, particularly those who write law review articles. Severed from the case, they seem to mean one thing, but in place you will find that they mean something that is normal and logical. The statements in judicial decision are usually answers to specific arguments, and who would try to understand the answer without understanding the question?

The previous speaker has read definitions in Section 2 and has compared them with the judicial review provisions in Section 10. Of course you can get very many odd effects

under this Act if you operate that way. If you do not read the whole and find out what modifications of definitions in Section 2 have occurred before you get to Section 10, you get some very strange results. It will be disastrous to you if you try it in court.

It is said that under this Act "all is changed." If there is a reactionary wing of the legal profession, it prays that the previous speaker's gloomy predictions are true. But I am concerned that people be not misled. It would be unwise to let the word get out, either by way of criticism of this Act or otherwise, that it does something which it does not do. Anyone who attempted to apply generally, or assume generally, that this law had "changed everything" will find himself in deep trouble. That has happened in court a time or two already.

Another thing which the previous discussion illustrates very well is the difficulties of the lay administrator. But a lay administrator, let us assume, looks at it and says, "It changes everything." When he got to that point, he would call in his official counsel who understands federal legislation and he would conclude very rapidly that it did not mean all the dire things that we have just been told.

One of the things that seems to me most captious is the discussion about the Federal Register. I have not noticed in the last ten years that costliness is a bar to initiating governmental processes. It is suggested now that agencies publish their rules once a year; how, pray, in this field with its rapid change would we know from one year to the next what the situation is? It is said that the Federal Register is of importance only to large concerns and their lawyers. I can speak from personal experience on that score. I am not a large concern myself, nor am I a lawyer for large concerns. I get three copies of the Federal Register every morning and make good and indispensable use of all of them.

It is said that the previous speaker is one of the few people who gathered all the federal procedures, all the information. A most remarkable individual, because one of the findings of the Attorney General's Committee was that many of the procedures were absolutely unobtainable even by an official body such as it was. It took that committee two years to gather the public information. Even then some of the departments went to the President and secured immunity. They would not even talk with the Committee or its staff. It is to be doubted that the Brookings Institute has ways of finding out procedures that lawyers, business concerns, and a Presidential commission does not have. The ordinary private individual undoubtedly was faced by an intolerable situation.

Have we so soon forgotten the Hot Oil case? There a lawyer stood before the Supreme bench and described how neither his client nor himself had ever seen the regulation under which he was prosecuted until it was pulled out of the hip pocket of a field representative of a certain agency, and that he did not believe the court would require him to be bound by such "hip pocket jurisprudence." The Court agreed with him. The government's brief admitted that even the agency was unaware that it had repealed its own regulation. Yet it is suggested that you should not publish these things.

My learned friend implies that the publication requirements are in this Procedure Act. The Federal Register has been in existence since 1936. Those materials were supposed to be in there from the beginning. If anybody wanted to require people to be bound by a regulation, according to the Federal Register Act, it had to be in the Register. The American Bar Association did not invent the Federal Register. As a matter of fact, I know from personal experience it had nothing to do with the creation of the Federal Register. It was not consulted about the Federal Register. The Attorney General's Committee found in its checking that the Register Act was not

working just because it did not contain in so many positive words, "Thou shalt publish." The Register Act requirements were stated in negative form. That's about what it comes to. The Procedure Act now minces no words on the point.

The suggestion was also made that it is a "damnable" thing, if I heard it right, that a regulation should not be enforceable if not published. But shall honest and sincere people suffer penalties to violating requirements of a hundred distant agencies without opportunity to know officially what those requirements are? Publication has been fundamental in the western world since the classic incident of the Twelve Tables in Rome. The purpose and reason for publishing is not only so that those who wish to read may, but so that the rule cannot be changed and said to be something which it was not. The only way we know to fix terms is to put them down somewhere so that they may be verified if need arises.

There was some talk about the declaratory order provision. The declaratory judgment was not invented by the American Bar Association. I suppose the man mainly responsible is Professor Borchard of Yale. Of course we had them in the state courts very successfully for many years and the Attorney General's Committee, made up of various government representatives, concluded that administrative tribunals should have the same declaratory power. As a matter of fact, it is very strange that anybody should object, particularly anyone who is in favor of the administrative processes, because he is saying in effect that administrative agencies of the government ought to have more limited and more formal jurisdiction than other agencies of the government such as courts.

What has happened this afternoon ought to demonstrate that, if you are serious students of this subject, you need to study very hard and thus be able to make up your own mind as to whether some of these criticisms of these

charges are true. Unless you can you will not be able to practice administrative law in federal agencies with any degree of assurance.

Thank you very much.

DISCUSSION PERIOD

FEBRUARY 1, 1947

The Session Convened at 3:30 p.m.

DEAN VANDERBILT: I recall one incident from the Attorney General's Committee work on the subject of regulations. While one agency was handing out a set of regulations by which the public was to be guided, its own agents were blandly ignoring that and operating upon a secret set of instructions which were mimeographed and which were colloquially known as the "Mims." So the public had printed regulations by which they blindly stumbled along and the agency representative who fixed it up, or fixed it down, as the case may be, was operating by a mimeographed set of regulations which were of later date and validity. The fact is I got stuck in one of those proceedings before I found out to the contrary.

I am sure Mr. Benjamin must be bubbling over with questions because he not only wrote one volume on the subject but, as I recall it, six. Is that right?

MR. BENJAMIN: I wrote one and the staff wrote five.

I would like to ask one or two questions. I would like to preface it by saying that I think that this bill is far better than any other bill that has been presented by, for, or in cooperation with, or in some other relation to the American Bar Association.

I think it is very much better than in the form in which it was first introduced in the Congress.

It seems to me that there are a number of problems about it. I do not feel the difficulty that Mr. Blachly feels; that the provisions with regard to hearing are pretty general. Except for the section on evidence as to which I have some questions. They do not confine the agency to any particular form of hearing procedure.

I was curious when Mr. McFarland said earlier that I had some predilections in my own study which I do not recognize myself, whether he meant by that that I came to some conclusions he did not agree with?

I would like to say this: I recommended pretty strongly against a general act in New York partly because New York already has individual statutory procedures governing most of the points that I think are legislatively covered by this bill and also because judicial decision has covered many of the other points, such as the impropriety of basing decisions on matter not in the record and the requirement of findings of fact. Those are matters of decision by the courts and a general statute, I think would be inadvisable here. I think also in the federal field there is risk in the general statute and it is that to which I would like to direct a few questions. I think there is a danger in trying to prevent abuses in particular application for in making sure you are preventing an abuse you are thinking of you may hamstring something else that you are not thinking of.

Against that background I would like to ask Mr. McFarland a question about Section 9(b) which relates to licenses and provides, in the second part of that subsection, except in certain cases where public interest, and so on, otherwise requires, which is so vague I do not know how it would be applied. But that is part of my question. "No license revocation proceeding can be instituted until the licensee is given an opportunity in writing, on a written statement to demonstrate or achieve compliance."

My guess is that that is directed to what is considered an abuse perhaps in some types of SEC proceedings where publicity through the institution of an action is highly damaging. But it still seems to me that it opens the way to hamstringing in some other kind of license revocation proceeding. I am not clear about what is meant by "opportunity to demonstrate or achieve compliance." I do not know whether there is an implication that there is nothing that you cannot cure by later achieving compliance.

I am particularly concerned with the question why you cannot start the license revocation proceeding until you give them that opportunity.

MR. McFARLAND: I can very well see on a theoretical basis why you would ask that question. The answer can be long or short, the short answer being the difference between what is done in the federal field and what is done in the states.

Federal licensing, in the first place, deals mainly with large industrial, agricultural, or financial institutions and the idea of giving warning is already embodied in some of the statutes. As a matter of fact, in part of the banking system it is mandatory that two warnings be given and two chances be afforded. The suggestion was made that if the bankers were entitled to two warnings, perhaps other people were entitled to one. Nobody objected to it.

MR. BENJAMIN: For instance, you have a Master's license, or a Pilot's license, which is very much like a state license. Maybe most of those cases would be public interest, and so on, which would waive that provision. It is pretty hard to say which is which, and when an agency starts, it is running a risk.

MR. McFARLAND: When you examine the precedents and the general situation, you will find that—although you may think those words are pretty vague—it is just about a correct view of the federal policy and system.

MR. BENJAMIN: What about taking over an insolvent bank by the Controller of the Currency? Does he have to give a written statement?

MR. McFARLAND: He's not revoking any license. You can be sure that, if it were potentially disruptive, we would have heard about it.

QUESTION: I would like to direct a question to Professor Blachly and it is this: Is his position, as he has expounded it here this afternoon, based on the premise that substantially all administrators or administrative agencies uniformly carry out objectively and fairly the program that had been delegated by the legislative branch to the administrative agencies?

MR. BLACHLY: That is very hard to answer. You have some great difficulties in that respect. The first is the difficulty that many statutory authorizations are so very vague. When the statutory authorizations are vague, the agency must, in carrying out its functions, exercise considerable discretion. I think you will find that is true all the way through.

In the second place, if the agency goes beyond its jurisdiction there is always a remedy — any individual who thinks that the agency has gone beyond its jurisdiction can appeal to the courts. The agency must, according to the general scheme of law, stay within its jurisdiction. But what it actually will do in any particular case is a very difficult matter to say, and it is especially difficult because of the fact that the court may or may not agree with its views as to the limits of its powers.

QUESTION: I had particular reference to the field of administrative discretion. Do you base the position that this Act goes too far on the premise that administrators in agencies have been unbiased and have been fairly objective and have observed, for want of a better expression, "due processes of law" with reference to the rights of

private individuals? Do you feel that in the field of discretion administrators have been within their proper jurisdiction with fair uniformity?

MR. BLACHLEY: I tried to point out that the big field of discretion is in the regulatory actions of the government, and there the statutes themselves are extremely vague as to just what the agency shall do. Also, it seems to me that by and large they have pretty uniformly been upheld in what they were attempting to do in the cases that have come before the courts.

Take, for instance, the Hope Natural Gas case, the Interstate case, the Pipeline case, and so forth. In these instances the agency appeared, on the face of things, to be going perhaps a little bit beyond its statutory authorization in placing an original cost basis upon the gathering of production facilities. But the Supreme Court upheld them in that, and in case after case where an objection has been made that the agency has gone beyond its jurisdiction the courts have upheld the agency in its actions.

I do not think you can make any definite statement as to whether or not administrative agencies have remained within their jurisdiction. On the whole, I think that the agencies have been sustained on appeal about as often as the lower courts have been.

DEAN VANDERBILT: Is not that something, though, that is very hard to learn? I had occasion for two years to check through applications for certiorari and I very definitely got the opinion that when the agency thought it was going to lose on its way up to the Supreme Court, it did not pursue that case; it only took the cases that were either vital to the continuance of the operation of the agency or that they thought had something better than a fifty-fifty chance. Therefore if we view the action of the Supreme Court on certiorari applications and subsequent judgments thereon, we are apt to get quite a false view of what is actually going on in some of the federal agen-

cies because the tough cases are quietly settled. At least that's my suspicion.

MR. BENJAMIN: I think it goes a little further than that, certainly in New York. As long as you have a limited scope of judicial review, which I think you should have, it is not fair for the agency to say, "The court must uphold our decision if it is a rational decision, even if we may be wrong," and then to say, "The court finds all the time that we are right." The court does not find that they are right. It just finds that they are rational, assuming that the agency has acted in an honest judgment in getting to that point.

May I add one more thing that I think ought to be said in relation to a discussion of a general Act like this and that is that one danger of a general Act is once it is passed people will sit back and say, "Now we have solved everything, we have passed a law and the agencies have to be good." I think Mr. McFarland would agree that a great deal more still remains.

In relation to the last question, if agencies have abused their discretion they can still, if they wanted to, abuse their discretion considerably under this Act. Fundamentally what you need is education of the administrator into a recognition that a good administration is equivalent to fair administration.

DEAN VANDERBILT: Was not that pretty well brought out though, Mr. Benjamin, in the congressional debates in both Houses with numerous congressmen and senators saying, quite without regard to party, "This seems to be all right but we are going to keep on watching you men in the agencies and if this does not work, we are here and we will be back at you again."

MR. BENJAMIN: I do not know that watching them is going to do any good. If they said, "This looks all right but we will keep on trusting you to do a good job," I think they might get further.

QUESTION: I wonder if Mr. McFarland would care to comment on the effect of the use of the word "substantial" in the statute in connection with the evidence upon which judicial review is based—as to whether he thinks the Dobson rule is affected by the statute?

MR. McFARLAND: I can answer your question very simply by saying no.

QUESTION: I should like to ask Mr. McFarland whether what the Attorney General implied in the statute defining "order" and "rule" will have any practical effect upon usage by the agencies? Can it be said that the statute was a mandate to the agencies to use those terms instead of the ones they are now using?

MR. McFARLAND: The answer is no.

QUESTION: The purpose of the Act as reflected by the title is to improve the administration of justice by prescribing fair administrative procedure. It seems to me that carries the strongest implication that the administration of justice needed improvement and in particular that we needed fair administrative procedure, further implying that what we have at the moment is unfair administrative procedure. It seems to me that in his first remarks Mr. McFarland dealt rather gently with that implication.

This question, which is very similar to one asked earlier but which I think has not quite been answered. The question is this: It is a sort of double-headed question. Is it Mr. Blachly's view that the implication is wrong, that is to say, that there is no evil against which Congress is called upon to legislate, or if there was an evil, is it Mr. Blachly's view that they adopted the wrong means for dealing with it?

MR. BLACHLY: I would say that on the whole, the procedures of administrative authorities did guarantee a fair review. I think you can get no other implication from read-

ing over the detailed procedures of some 25 or 30 authorities.

In my opinion, one of the very great difficulties was the fact that procedures were not nearly so uniform as they might have been and therefore caused confusion. Some of the procedures undoubtedly were too complex. But I do not think that, in general, the procedures were such as to warrant the attack made by the Bar Association upon them on the ground of "administrative absolutism." It seems to me that I have heard a dozen speeches by members of the Bar in the past ten years that have emphasized "administrative absolutism," and I doubt whether half of those members who made the speeches had ever studied the detailed procedures of the agencies. I think there is a tremendous propaganda in that respect. I do think there is a tremendous room for improvement.

I want to answer one thing that Mr. McFarland said.

He seemed to infer that I did not believe in publication. I do believe in full publication. I believe that a very detailed study should be made of what publication is desirable and where it should be made and how it should be made. In fact I was one of the original people, I suppose, responsible for saying that we should have a Federal Register Act, and I served on a committee to try to determine what should be put in the Federal Register. The President required all agencies to send what they thought should be put in the Federal Register and the men who had charge of looking at those suggestions found all kinds of materials under the sun.

Now, just what should be put in the Federal Register and what should not be put in the Federal Register? What should be placed, not in the Register, but in pamphlets published by the administrative agencies so anybody can get at them. This, it seems to me, is a fundamental problem.

I disagree entirely with the statement Mr. McFarland seemed to make that I did not believe in publication. I do

believe in full publication. I think I have suffered from the lack of publication as much as anybody, because I have worked for the last fifteen or twenty years to find out what this administrative process is all about. I also rather object to the insinuation that a person who has taken his doctor's degree in Public Law at Columbia University; who has since studied Public Law for twenty years; who has read practically all of the administrative cases; who has gone through all the procedures obtainable; who has read most of the court decisions and all the leading ones; and who has made a detailed analytical study of all the statutes, is as incompetent to work upon the subject as three old maids on a ranch.

DEAN VANDERBILT: I think now is a good time to adjourn the meeting. But I cannot resist telling you of a few of my experiences, which I am very careful to say, are not in the federal field. I was having some trouble with a state agency over the subject of milk licenses and it gradually came out under cross-examination that there was no holder of a permit who had wholly complied with the statute. That led me into an interesting field of cross-examination as to which of the some twenty-four provisions of the statute the Chief Inspector thought were important and to what extent he thought they were important. The witness gravely went through the twenty-four sections of the statute which were mandatory in their form and he graded each one as to the extent to which he insisted upon it being obeyed, ranging from ten percent as a low and ninety percent as the high and few came within that. These being his grades, you got your permit. If you did not, why you did not get your permit. Of course, I think that is as good an example as you can find of how these fellows who get the feeling that the act is their own and the interpretation is their own need to be occasionally reminded by either the court or the legislature that they are not the sovereign body.

THE FEDERAL COMMUNICATIONS COMMISSION

LOUIS G. CALDWELL

Of all the federal administrative agencies, including those to be discussed in the course of this Institute and others as well, the Federal Communications Commission (FCC) furnishes the most conspicuous example of the use of licensing as the weapon of regulation. It is true that, under the very broad definition of "license" in the Federal Administrative Procedure Act, most of the other agencies also make use of this weapon but none, I think, does so to the same extent, or in the same all-embracing manner, or over a subject matter having equal significance.

My discussion begins, and will end, with the thought that no field of administrative procedure presents greater problems, or is open to greater abuses, or has been less adequately explored than licensing. I need not tell you what rapid strides it has made in recent years as a favorite method of government of achieving regulatory purposes. The FCC may be regarded as the principal laboratory where experimentation in its possibilities and dangers has been carried on. It is appropriate, therefore, that considerable attention should be focused on the impact of the new statute on this agency. The story can be told only superficially in the time available.

NATURE OF THE FCC'S REGULATORY FUNCTIONS

The Communications Act of 1934 was, as stated in its first section, enacted for the purpose of regulating interstate and foreign commerce in communication by wire and radio. Radio communication is defined by the act as the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds. Wire communication is defined in similar terms with respect to wire, cable, or other like

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connection. In recent years the word "telecommunication" has won general acceptance as a convenient term embracing all forms of communication by electrical processes, whether wire or wireless.

The Act created the FCC, a commission composed of seven members appointed by the President for staggered seven-year terms, with the advice and consent of the Senate. The chairman is designated by the President.

With exceptions that are not immediately pertinent, the FCC is charged with administering the provisions of the Act. Its jurisdiction represents a merger of powers and duties which, prior to 1934, were scattered among several federal agencies. The most important of these were the Interstate Commerce Commission and the Federal Radio Commission. It has the common carrier jurisdiction formerly exercised by the Interstate Commerce Commission over the rates and practices of public utilities engaged in interstate or foreign communication, whether by wire or radio, such as the cable, telegraph, telephone, radiotelegraph and radiotelephone companies. It has the licensing jurisdiction formerly exercised by the Federal Radio Commission over all forms of radio communication, including the radiotelegraph and radiotelephone common carriers, as well as broadcasting and many other uses of radio. In 1937 Congress conferred on it an additional field of regulation relating to radio equipment and radio operators on board ship, having as its purpose the promotion of safety of life and property at sea, pursuant to an international convention on that subject.

Except for incidental references I shall pass over the FCC's jurisdiction in other fields in order to concentrate on radio licensing. The common carrier provisions, assembled in Title II of the Act, are an adaptation of the provisions of the Transportation Act which will be fully discussed in the lecture on the Interstate Commerce Commission. The provisions relating to radio equipment and radio operators at sea, contained in Part II of Title III of the

Act, relate to a subject sufficiently different from the subjects to which the Act is principally devoted that to include them in this discussion would entail unnecessary confusion and an undesirable curtailment of time for considering matters in which I am sure you will be more interested. You will understand, I am sure, that in passing over these two fields of the Commission's jurisdiction I am not belittling their importance or their difficult problems, either substantively or with respect to administrative procedure.

The radio licensing provisions are contained in Part I of Title III of the Act and are almost a verbatim reproduction of the Radio Act of 1927, under which the Federal Radio Commission functioned from 1927 to 1934. That was preceded by the Radio Act of 1912 under which the Secretary of Commerce functioned as the licensing authority for 15 years. In those years, particularly the score of years since 1927, is packed a lot of important history relating to procedure, without some knowledge of which the reasons for the FCC's present procedure cannot be fully understood. The present procedure is the composite result of constant experimentation on the part of the FCC and its predecessor, the Federal Radio Commission, largely in the direction of efforts to derail the procedural requirements of the Act and of due process, and of court decisions which, on the whole, have tended to force recognition of those requirements. For want of time I shall be unable to do more than give you a bird's-eye view of the procedure as it now stands.

It is a truism that, notwithstanding even the express provisions of a statute, the substantive law and the facts and events and persons to which it applies have an all-important role in moulding the procedure and that the procedure, once established, has no small influence in its repercussions on the substantive law. I don't know of any field in which this truism has been more dramatically demonstrated than in the regulation of radio communication. Perhaps this is because I have been so close to it,

and have done so little else, for over twenty years. Perhaps also it is because events have moved so rapidly with the result that something corresponding to the experience of centuries in other branches of law has been telescoped into two decades in this branch. At any rate I find it impossible to conform to the outline prescribed for this series of lectures without first giving you an over-all review which will trespass to some extent on each of the succeeding headings.

Mr. Justice Frankfurter, applying one of his favorite metaphors, has said that the chameleon of the radio portion of the Communications Act is the standard "public interest, convenience or necessity" which Congress formulated as the guide to the FCC's exercise of its powers, that is, the channel within which its functions must be performed. The standard has changed color with each of the nine chairmen and the twenty-two other members who have served on the FCC and its predecessor commission. That would not be important to a discussion of the procedure if it were not for the fact that frequently a change in color in the standard has been reflected in a new tint on the procedure.

Perhaps the simplest method of illustrating the importance of the standard, and its eventual effect on procedure, is to suppose that the same scheme of government were applied to the State of New York as is applied by the Communications Act to all persons who operate, or desire to operate, radio stations. This supposition is not without justification since, in a measure, statutes such as this are bringing about a re-subdivision of the United States. Imagine that, in lieu of the governor the legislature and the courts of this state you had a council of seven appointed by the President, imagine also that the state constitution, its statutes and the hundreds of volumes of reported court decisions were to give way to a short code somewhat as follows:

Section 1. No one many enter the state of New York

unless he convinces the council that his entry will serve "public interest, convenience or necessity."

Section 2. No entry permit is valid for more than three years, at the end of which the holder, if he wants to stay in the state, must again convince the council that his continued presence will serve "public interest, convenience or necessity." Otherwise, he shall be deported.

Section 3. The council may promulgate any law it pleases provided only that the law be such as is required by "public interest, convenience or necessity." Any violation of one of the council's laws is ground for deportation. A violation is also subject to prosecution and fine in the courts (this provision, for some reason, is never used).

Section 4. The conduct of the inhabitants of the state must, in all other respects, conform to "public interest, convenience or necessity." Anyone who acts contrary to this standard shall be deported (this section, I should explain, is not to be found in the charter but was inserted by the council itself so far successfully as far as the courts are concerned).

Section 5. The boundaries of the State shall be fixed by the council according to "public interest, convenience or necessity" (under this section people who thought they were in Connecticut or New Jersey may wake up any morning to find that they are in New York, or more likely, that they are in all three states).

Section 6. Anything that may have been overlooked in the foregoing is to be done or decided according to "public interest, convenience or necessity."

There you have it, at least as it was when the Radio Act of 1927 was enacted; all the law in six sections easily memorized by any school boy. There is no longer any excuse for ignorance of the law.

Needless to say, again to quote Mr. Justice Frankfurter, this is "pernicious oversimplification." There is, of course, no real law in a state until the standard is given

some measure of definition and meaning, that is, until it is translated into substandards that can be applied directly to the persons regulated and the fact situations which arise. Until this is done, furthermore, the procedure cannot be satisfactorily crystallized. It is impossible to tell what persons and interested parties, and to what extents notices and opportunity for hearing are necessary.

So far I have not mentioned what is easily considered to be the principal problem in interpreting and applying the standard. It is, to continue the same imaginary hypothesis, that the State of New York will hold only a given number of people and that many more are applying to enter than can be accommodated. The standard must therefore be used as a guide for choosing a few out of many as well as a guide for maintaining orderly and efficient conduct by the people who are already inhabitants of the state. This peculiarity, which is commonly referred to as the "scarcity theory" has, as you might imagine, terrific repercussions on the law of the state. Its significance, in my opinion, being greatly exaggerated as a reason for making laws under the heading of "public interest, convenience or necessity" that the council has no right or power to make, but that is neither here nor there in this discussion.

It is important, however, to note that the "scarcity theory" does not apply to the whole state. The state has had to be subdivided into regions to each of which only one class of persons will be admitted. In fact one of the important legislative functions of the council is to make this subdivision, again according to the standard of "public interest, convenience or necessity." One region is set aside for standard AM broadcasters; others for other kinds of broadcasting such as FM and television, including black and white and color. Still others must be set aside respectively for persons engaged in operating various other kinds of radio stations, such as those used by the radiotelegraphy and radiotelephony communication carriers, aviation, maritime, police, fire and miscellaneous

emergency services, railroad, taxi, bus, truck, amateur, experimental, etc. In each region "public interest, convenience or necessity" means something different than it does in any other region. For example, in connection with the common carrier radio communication companies, it includes, or at any rate should include, a close parallel with the standard under which the construction of a new wire line or of an extension of any wire line is authorized, namely, "public convenience and necessity." Broadcasters on the other hand are, by specific provision, declared not to be common carriers. The "scarcity theory," however, applies to both broadcasters and communication common carriers, that is, there is in theory at least, a limit on the number who can be admitted to their respective regions. As to other regions, there is no scarcity theory. Anyone who applies, and fulfills certain requirements, is admitted without any limitation on the total number. That is true of amateurs. In the case of airplanes and maritime vessels, not only are all admitted who apply but to a large extent they are required to come in. With respect to these regions there are no procedural problems which would be of particular interest to this discussion and they may be passed over. As already suggested, there are controversies from time to time as whether one region should not be larger and another smaller, but this difficulty is common to all the regions. It is also a difficulty which is very largely decided by international treaty.

The two regions in which the "scarcity theory" plays the greatest role are broadcasting and radio communication common carriers. Since the latter runs so close a parallel to the wire communication common carriers they, too, may be omitted. This leaves us to deal with broadcasting exclusively. At this point I shall abandon the comparison with the State of New York and return to the terminology of the Communications Act.

The cornerstone of this act is that you may not operate any kind of a radio station without a license from the

FCC. If you do you are subject to a \$10,000 fine and two years' imprisonment. So normally you apply for a license before starting to operate.

Under the act your application is made on a form prescribed by the FCC which is given very broad powers as to the information it may require. What you actually apply for at first is a construction permit. If you succeed in obtaining a permit and you fulfill its conditions you are then granted a license. Curiously enough you would hardly guess the procedure to be followed from reading the statute.

Section 319(a), covering applications for construction permit, stipulates that the FCC may grant the permit if "public interest, convenience or necessity" will be served but is completely silent as to any requirement of notice or opportunity for hearing either to the applicant or to any other persons who may be affected. Section 307(a) stipulates that the Commission shall grant a license of "public interest, convenience or necessity" will be served. Section 309(a) provides that if upon examination of any application for a license, or for renewal or modification of license, the Commission shall determine that "public interest, convenience or necessity" would be served by the granting thereof it shall authorize such issuance, renewal or modification. It further provides that in the event the FCC does not reach such decision, it shall notify the applicant, shall fix and give notice of a time and place for hearing, and shall afford the applicant an opportunity to be heard under such rules and regulations as it may prescribe. Taking these sections at their face value, there is no requirement of notice or hearing in connection with an application for construction permit; in connection with applications for licenses, or renewals or modification of licenses and notices an opportunity for hearing are required only if the application is not granted, and the only person afforded an opportunity to be heard is the applicant. None of these three factors is the law. From time

to time the FCC has tried to give literal effect to them but decisions of the reviewing courts, including the Supreme Court, have resulted in something very different.

As you all know, the granting of an application for a new broadcast station, or for increase in hours of operation for an existing broadcast station is almost certain to have an adverse effect upon persons who already have stations in operation or who are applying for them. The granting of the application may result in interference to and existing station, or to a station proposed by some other applicant. It may make it impossible to grant one or more other pending applications because of interference. The reviewing courts have held that a person who will thus be adversely affected must be given an opportunity for hearing. The proposed new station may have an economic effect on existing stations in the same locality because of a real or supposed inadequacy of commercial support for more than the existing number of stations. For a considerable period the FCC took this into account and considered the licensees of existing stations as legitimate parties in interest. Then with a change in chairmen it changed its mind. The issue went to the Supreme Court which seemed to say that the Commission does not have to take the economic effect into account.

Then there are cases where an application has been opposed because of the past or proposed program service of the station. This is an extremely important but nebulous field on which the Supreme Court has not yet passed. At present the FCC's rules seem to be that persons having such objections may appear and give testimony on almost anything but are not to have the standing of parties. There is also what I think was intended by Congress to be the principal ingredient in "public interest, convenience or necessity" as applied to broadcast stations, namely, that the FCC shall make such distribution of broadcast facilities

among the several states and communities as to provide a fair,

efficient, and equitable distribution of radio service to each of the same

This leads to the recognition of a measure of right to participate on behalf of representatives of states and other geographical subdivisions in the country.

As interpreted by the courts the Commission must, on an application for a construction permit, afford opportunity for hearing to anyone adversely affected by way of interference. Once that hearing is over, and the application is granted, there is usually no further hearing when it comes to application for license. In other words as construed by the courts the act requires the hearing not only before an application is rejected but also before it is granted when it adversely affects another licensee or applicant within the meaning of the words "adversely affected."

So far I have talked mostly in terms of an application for a new station. Once you get a license, it is for a period of three years in the case of broadcast stations; in the early days it was only for three months. For other kinds of radio stations the license may be for as long as five years, but usually is not. Not less than sixty days before the expiration you must apply for a renewal which the Commission will grant or deny according to the same standard. Over the years most renewal applications have been granted more or less automatically if, as is usually the case, the applicant furnishes all the information required in satisfactory shape. A certain number, however, are held up and of these some are set for hearing. There are, in general, two groups of reasons for setting renewal applications for hearing. In one group are those cases where someone else has filed an application, usually for a new station which if granted would make further operation of the existing station impossible for technical reasons. For example, John Doe may apply to use the frequency 660 kc in New York City or within a short distance of New York City. WEAJ is now using this frequency.

Either WEAf or John Doe must give way and a sort of competitive hearing is held. The other group of reasons may be broadly described as misconduct on the part of the station whose license is sought to be renewed. In other words renewal proceedings are used for disciplinary or penal purposes, the sanction or penalty being denial of the application.

I must pause here to interject that this use of the renewal proceeding was an unforeseen development, not I believe contemplated by Congress. The act contains a section providing for revocation of license with a list of grounds, to which I shall refer presently. The fact remains that in twenty years there have been only two or three instances of revocation of licenses and a very extensive use of the renewal procedure for purposes of discipline and punishment. The principal cause for this is found in the advantages it gives the FCC.

Actually, during the twenty years there have been relatively few stations eliminated by denial of license renewals. It has been unnecessary to go this far, once the power of the FCC to proceed in this matter has been upheld in the courts. What the FCC really does is illustrated by the events of the past year. There were times in which over three hundred broadcast stations whose licenses had expired and who had not received renewals. Instead they had been given 60-day temporary extensions of their licenses while the FCC staff scrutinized their applications and their performances during the previous license period to determine whether to grant the renewal or to subject them to hearing. A very few were set for hearing. Others, on finding out what was responsible for the doubt in their cases, came in and learned that they were accused of this or that, usually some type of program or program practice which the Commission did not like. Usually they considered discretion the better part of valor and discontinued whatever it was that was found objectionable, with promises never to do it again. Still others were eventually

granted renewals. I need not tell you what a lethal weapon this holding up of a renewal is. I do not know of any adequate procedural safeguard against it. Under cover of this procedure the FCC is conducting a very far-reaching censorship of broadcast programs, although its members will stoutly deny the charge. The trouble is, of course, that you cannot get judicial review until it is too late, after your renewal application has been denied. The reviewing court has the power to grant a stay order but this relief has been more frequently denied than granted, particularly in cases involving programs. So far the Supreme Court has refused to take such cases on certiorari. Consequently, to the average broadcaster it seems sensible to do what the FCC wants rather than hazard annihilation of his means of livelihood in order to be a martyr to principle.

The section on revocation, at least as so far construed in practice, puts the burden on the FCC of a much more definite notice of charges, and the burden of proving those charges. To an unfortunate extent, the burden on a renewal application is apparently on the applicant and it is difficult to foresee the result or the principles on which the result will turn. The revocation section lists as grounds such matters as false statements in the application or other statements furnished to the Commission, violation of provisions of the act and violations of any of the FCC's regulations. All these have been read into the act as likewise constituting grounds for refusing to renew. More important, there is a broad zone of so-called misconduct which cannot be reached under the revocation section which the FCC has reached, so far successfully on renewal applications. Here I must call your attention to another unforeseen development.

The FCC reads the act as if it requires all licensees to conduct themselves during their license periods in accordance with "public interest, convenience or necessity." Actually it does no such thing. It requires the FCC to

operate according to this standard in its actions on applications and in making regulations. So far as licensees are concerned the act simply requires that the station be operated in accordance with the provisions of the act, with the Commission's regulations and with the terms and conditions of their licenses. So far, however, the courts have been with the FCC on this question.

The act contains a few specific prohibitions and commands with which broadcasters must comply. It contains, for example, prohibitions against the broadcast of obscene, indecent or profane language, and against the broadcasting of lotteries. The FCC now says, however, it also contains a command that each licensee must not violate "public interest, convenience or necessity" whatever that means. By this device the FCC has taken unto itself jurisdiction of passing on whether programs and program practices conform to this standard. This is notwithstanding the express prohibition in Section 326 against censorship by the FCC and against any interference with free speech by radio, and is something which it admittedly could not do on revocation.

It was this development which I principally had in mind when at the outset I endeavored to emphasize the procedural problems presented by the licensing system as used by the FCC, where the renewal procedure has been largely substituted for revocation as the means of discipline and sanction. I don't know of any agency where the development has occurred, at least on the same broad scale. When coupled with a broad and indefinite standard such as "public interest, convenience or necessity," and applied to a medium of mass communication, it is susceptible to the most arbitrary and capricious abuses and indeed it has been. It is desperately in need of procedural safeguards.

I have not exhausted what may be called the adjudicatory functions of the FCC. Other types of applications on which it passes are applications for renewal of licenses, applications for the Commission's approval for transfer

of license or of control in a licensee corporation and certain miscellaneous types. I don't think any useful purpose will be served by considering them separately.

Now let us turn to the FCC's legislative power. With exceptions that are not too important these legislative powers are enumerated in a series of 18 subsections of Section 303 of the act. There is room for some difference of opinions as to whether a few of these are really delegations of legislative authority as distinguished from guides to the exercise of the adjudicatory powers but for our purpose the question is not too important. Most of them have to do with the technical and physical aspects of radio including such matters as the classification of stations, the assignment of bands of frequency to the various classes, regulation of the type of apparatus to be used, regulations to prevent interference, and the like. A couple of them have economic corollaries. One of them has been construed by Mr. Justice Frankfurter, speaking for a majority of the Court in *National Broadcasting Co. v. United States*, 319 U. S. 190, 63 Sup. Ct. 997, 87 L. ed. 1344 (1943), to embrace a lot more territory than seems to have been contemplated by Congress, but still not so broadly as to embrace program regulation (I hope). Then there are sections or subsections giving the FCC power to make such regulations not inconsistent with the law as may be necessary to carry out the provisions of the act. All these legislative powers are subject to and limited by the standard of "public interest, convenience or necessity." The act contains no provision requiring any hearing or other formal procedure as prerequisite to promulgation of any regulations. There is one exception to this in Section 303(f) which is really not an exception. It forbids changes in the frequency power, or hours of operation of any station unless after public hearing the Commission shall determine that such change

will promote public convenience or interest or will serve public

necessity, or the provision of this act will be more fully complied with

Perhaps to make the picture complete I should explain here that another section of the act, 312(b) gives power to the FCC on its own initiative to modify a license but this, too, is subject to the standard and to procedural requirements which, it is believed, are tantamount to a requirement of notice and opportunity for hearing. For many years the FCC has had in force and effect the equivalent of bulky volumes of regulations. Part of these, the smaller part, covers procedure all the way from the form and letter of presentation to and including rehearings on decisions. The remainder are substantive with a set of general regulations and then a set for each class of radio stations. So far as broadcast stations are concerned they have to do almost entirely with the technical and physical aspects of radio with a few excursions into the economic field. In no real sense does any of them have to do with programs or program practices. The FCC has from time to time declared it could not make regulations on programming without violating the prohibitions against censorship.

Up to this point I have described what may generally be called the common law method and the legislative method of making law. The common law method is represented by the Commission's decisions, stating facts and grounds, resulting from hearings on applications or from revocation proceedings. The legislative method is represented by the regulations. Unfortunately a large part of the law that is now being applied on the common law side, particularly with respect to broadcast programs, never comes to light. It consists of rulings that are concocted and enforced when a station is trying to wiggle out of a 60-day temporary license and to obtain a regular renewal. The same, I may add, applies when, during the course of a license period, a complaint against programs is forwarded to a station and it is required to file a full state-

ment in explanation, frequently consisting of a declaration that it has ceased the practice complained of.

This brings us to a third method of making law which will not be found in the Communications Act, and yet has already proved to be a formidable weapon for compelling stations to meet the notions of the FCC. It consists in promulgating "standards." It is an offshoot of an interpretation of the act as requiring licensees to perform according to "public interest, convenience or necessity." Let me give you an example. On March 7, 1946 the Commission adopted and published a document which is called a report entitled "Public Service Responsibility of Broadcast Licensees." It has become popularly or unpopularly known as the blue book, an appropriate title. In length it is the equivalent of a full length novel. Its contents are entirely devoted to programs and program practices. The blue book comes to a climax with its final chapter setting forth conclusions. The basic conclusion is that the FCC has a statutory responsibility for improving program service for the public interest "of which it cannot divest itself." It then proceeds to announce that in issuing and renewing broadcast licenses the FCC "proposes to give particular consideration to four program service factors relative to the public interest." What is meant, as explained by the subsequent language is that, to be considered as operating in the public interest, a broadcaster must devote a reasonable proportion of time to sustaining programs, a reasonable proportion of time to local live programs, a reasonable proportion of time to programs devoted to discussion of public issues, and not more than a reasonable proportion of time to advertising matter. The blue book makes it clear that these requirements apply to all segments of the day with particular reference to the choice listening hours between 6:00 p.m. and 11:00 p.m. There is no definition as to what "reasonable" means in terms of percentage of time or in any other terms. The warning, however, is not implied, it is expressed. The FCC

will tell you that these provisions in the blue book are not regulations. It is true, of course, that they are not phrased so that they can be considered to be violated in the course of a license period and thus make the culprit subject to revocation proceedings or fine in court under the penal provisions of the act. It is just as true, however, that licensees are being told that renewal will not be granted unless they conform to these standards. I think the FCC members who are arguing that these are not regulations are wrong under the decision of the Supreme Court in *Columbia Broadcasting System v. United States*, 316 U. S. 407, 62 Sup. Ct. 1194, 86 L. ed. 1563 (1942), but shall not stop to debate that. At the very least I would say that the provisions are within the definition of a "rule" in the Administrative Procedure Act as "statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public."

There are several other devices used by the FCC for making law which, while technically they may fall within one or the other of the classifications I have already mentioned, deserve separate consideration. They will illustrate why these questions so rarely get to court. For example, ever so often a renewal application will be set for hearing, a hearing will be held, and finally a decision will be rendered in which the renewal is granted but the applicant is given a sound spanking for certain program conduct which, in order to get a renewal, he has discontinued and given evidence of repentance. Another example, employed several times during the past two years, is not to set the renewal application for hearing, but to have a hearing on the question of whether there should be a hearing on the renewal application. In each of the four principal cases of this sort, a petition by some complaining party has been dismissed, there have been no hearings on the renewals, but the Commission has used the case to announce policies and interpretations having the effect and appearance of law in the form of written decisions.

Each one of them is in effect an announcement of policy or interpretation deduced from "public interest, convenience or necessity" as applied to programs.

You may be interested in knowing what the results were in these four cases. In one of them the FCC held that a station may not have a rule or policy under which it will not sell time, as distinguished from giving it away, for the discussion of controversial issues. This was at the complaint of the CIO. A few years before, when the broadcasting industry through its trade association, attempted a code containing a canon to this effect the chairman of the FCC loudly applauded. Well, he was a different chairman and the canon was originally designed to get Father Coughlin off the air. This time it was the CIO and that's different. In the second case, on the complaint of one Sam Morris, acting for the National Temperance and Prohibition Council, the FCC said in substance that if a station permits the advertising of alcoholic beverages it is raising a substantial issue of public importance and that prohibitionists have a right to time on the station to reply. In a third case, on the complaint, an atheist, the FCC held that where a station gives time to religious programs, such as church services, prayers and Bible readings, it must not have any rigid policy barring the presentation of the views of atheists. In the fourth case in which the decision was issued only two weeks ago, on the complaint of a defeated candidate for the governorship of Texas the FCC seemed to hold that no station may arbitrarily deny or restrict the right of any person or group to discussion of a controversial issue (even though all sides of the issues are treated uniformly and fairly) and that where the station is owned by a newspaper which has been opposing a candidate then any arbitration or restriction on the right to present an opposing point of view become "aggravated." It is not necessary to tell you that these are very important pronouncements. Unfortunately, neither before nor after the enactment of the Administrative Procedure

Act, does it seem possible to get any direct judicial review. They are *sui generis*.

It is frequently stated, and with justification, that the Communications Act gives the FCC no alternative between the death penalty and an acquittal. The only sanctions at its disposal are refusal to renew a license or revocation of a license. Actually, there are other sanctions since they can make life very miserable for an applicant or licensee who does not conform, but no one has found a way to get at this sort of punishment. In general the charge is true.

And yet in a larger sense it is also very untrue. The penal provisions of the Communications Act provide penalties of fine and imprisonment for any violation of the act, and substantial fines for any violation of an FCC regulation. The courts have a wide latitude in assessing anything from a normal fine to a heavy one. This, I am sure, was the method by which Congress intended that most violations should be dealt with, that is all cases except where the misconduct was so serious and repeated that the drastic punishment of taking away a license was indicated. The FCC, however, like most federal administrative agencies, avoids making use of the Department of Justice for such purposes. The penal provisions are almost never used except for cases such as violating the basic requirement of the act by engaging in radio communication without a license.

I realize that I have taken considerable time to give you this general picture in advance. Having done this will, however, save considerable time as I deal with the effect on the agency of particular provisions of the Administrative Procedure Act.

THE EFFECT OF SECTION 3

By September 11, 1946 the FCC had complied with Section 3 in a very thorough-going and commendable manner. On September 4, 1946 it released a mimeographed document of 137 single-space pages with appendices, exten-

sively setting forth descriptions and statements about its organization and the general course and method by which its functions are channeled and determined. This document adds a great deal to the information which had previously been made conveniently available and, although I do not recall any great amount of complaint against the FCC in this respect, I think Section 3(a) of the Administrative Procedure Act had a wholesome effect in bringing about an assembly of the information under one cover and, perhaps also, in compelling the Commission to clarify and make definite matters which were vague even in the minds of the commissioners. In criticism, however, I must add that no outsider reading the document for the first time would become aware of some of the proceedings employed such as those I have already described in connection with renewal applications. Perhaps their informality and even inconsistency forbid any intelligible description. The closing sentence of the subsection :

no persons shall in any manner be required to resort to organization or procedure not so published

does not help much. If, instead of a renewal license a broadcaster gets only a 60-day temporary extension, he naturally is not going to refrain from any steps to remedy the situation simply because they are not set forth in the published rules.

As to the FCC's compliance with Section 3(a)(3) the FCC has consistently complied with the Federal Register Act in having published all pronouncements which the FCC regards as regulations. It did not, however, publish the blue book nor has it published other documents which may be regarded as setting forth what it calls merely standards. It remains to be seen what it will do when the next occasion arises. None has since September 11, 1946.

For many years the FCC has done a good job in publishing its opinions and orders in the adjudication of cases. These opinions and orders are made available in

mimeographed form as soon as announced and are published in annual volumes called "Federal Communications Commission Reports." The only trouble has been that, due to wartime and postwar exigencies it is considerably behind in publishing these printed volumes but it is showing signs of catching up. Its rules and regulations have likewise been promptly published and made available in printed or mimeographed form although, it should be added, it is difficult to keep up with the passing of amendments and additions. At present writing it would be virtually impossible for anyone to go to the FCC and get a complete set. For example, the document I have already mentioned which was issued on September 4, 1946 is already a book collector's item. This is not in criticism of the FCC. The job is more difficult than appears on the surface.

As for Section 3(c), having to do with published records, I should be straying into detail if I spent much time in telling you what the problems and difficulties are. It remains to be seen how the FCC will interpret the provision. There are some classes of documents which are regarded as confidential and are either not available for inspection or are available only on appropriate application. These for the most part consist of contracts, certain types of financial reports, etc., filed by persons regulated by the FCC, either under express authority of the act or, in some cases, under very dubious authority. I think the complaint has been rather that there has been too much access to these documents rather than too little but would not want to pass on the justness of this complaint. Then there are documents which ought to come to light and which so far have not. These are reports made by the FCC's various departments such as engineering, law and accounting, setting forth facts and arguments bearing on whether the application should be granted or denied. Whether these are "matters of official records" is yet to be determined.

With respect to the anomalous opinions of the Commis-

sion such as the four I have described, they have regularly been immediately published in mimeographed form. I do not know whether they will ultimately appear in the bound printed volumes but to judge from past performance, believe they will be.

To summarize there is no room for any extended criticism of the FCC to date as to its compliance with Section 3. It has done a far better job than practically any other federal agency. With certain exceptions it was already doing a better job than most of the others prior to the enactment of the act.

THE RULE-MAKING FUNCTION OF THE AGENCY

Perhaps this is as good a place as any to deliver myself of a certain amount of disagreement with the definition "of rule and rule-making" contained in Section 1(c) in the Administrative Procedure Act. Notwithstanding repeated judicial pronouncements, even in the Supreme Court, I find it hard to agree that the definition should include such matters as the approval or prescription for the future of rates, wages, prices, valuations, costs, etc. This means, of course, that nearly everything that is done in the regulation of common carriers, except for reparations and the like, is to be called and treated like a "rule" unless the particular statute specifically stipulates otherwise. Under this definition the FCC's jurisdiction over communication common carriers is almost exclusively "rule-making" plus a certain amount of "licensing" in the issuance of certificates of convenience and necessity.

Passing this over I turn to Section 4 of the Act. As I have already pointed out with an exception that is not an exception, the Communications Act does not require hearing as a prerequisite to exercise of the FCC's rule-making powers. They are, therefore, not subject to Sections 7, 8 and 11 of the Act. Remember that I am only speaking of radio licensing. This is not true of the FCC's

powers to make "rules" applicable to the communication common carriers under title 2 of the act. Title 2 has the same sort of requirements with respect to notices and hearing, with respect to rates, practices, etc., as you will find in the Transportation Act.

In substance, the requirements of Section 4 have been observed by the FCC for many years. Notwithstanding the fact that the Communications Act makes no requirement of notice or hearing on nearly all important matters, the FCC has been extremely liberal in notifying all interested parties, in affording opportunity to be heard, and doing all that could reasonably be expected to give advance information of the subjects and issues. Also, I know of no serious complaint against the procedure followed.

Possibly in the past the FCC has not fully complied with the requirement of Section 4(b) that

the agency shall incorporate in any rules adopted a concise general statement of their basis and purposes

On the more important cases, however, it has published rather extensive reports which serve the purpose. I am not sure that I agree too thoroughly that this should have to be done on all rule-making in the strict sense of the word, as distinguished from the broad definition in Section 2(c).

As for Section 4(c) having to do with effective dates of rules, I see no hardship or important change from the practice which has been followed in the past. I doubt if there will be any complaint from the FCC. Thirty days after publication does not seem too long, particularly since there is a very broad exception where good cause is found.

With respect to Section 4(d), the FCC's rules for years have provided for petitions for issuance, amendment or repeal of a rule. Consequently, no change was entailed.

Let me turn back to Section 4(a) and refer to the exception made with respect to interpretative rules and general

statements of policy. This, I suppose, embraces the blue book and any other case where the FCC announces a so-called "standard" under the heading of "public interest, convenience or necessity." I do not believe I have ever thoroughly understood the distinction between an interpretative rule and other kinds of rules. In a sense they are all interpretative of statutory provisions. The result of the exception it seems to me is paradoxical as applied to the FCC. It must comply with the procedure set forth in Section 4 as to its rules on the technical and physical aspects of radio, on which there is frequently not too much need for this procedure and in any event on which there has been little cause for complaint. But far-reaching exercise of an authority which is at best dubious and extremely controversial may be freely indulged in without any restrictions, just so they are called "standards" interpreting "public interest, convenience or necessity."

THE ADJUDICATION FUNCTIONS

Within the limitations I have imposed on myself in this discussion, the FCC has no adjudication functions not covered by Sections 5, 7 and 8 of the Act. Actually it does have a few such functions, one of them I suppose is the authority to ascertain by examinations whether persons have the qualifications to be station operators in the technical sense. Another consists in decisions resting on inspections under the portion of the act having to do with radio equipment and radio operators on board ship. I shall disregard these.

Likewise under these limitations, all the adjudication functions I shall discuss are subject to Section 9(b) relating to licenses.

For convenience I shall deal with Section 9(b) first. Its first sentence reduced to its simplest terms, requires that the FCC shall act on applications with despatch, with due regard to the right or privileges of all interested parties or adversely affected persons. So far as the

"despatch" is concerned I would welcome word that the mandate had been read and carried out at the FCC. On some matters where the FCC ought to go slow it proceeds swiftly and recklessly. On others, proceedings have dragged for years. I am not sure that a general legislative direction to be expeditious is going to make much difference. So far as "the due regard" to the right and privileges of others is concerned, if this simply means that the others have ample opportunity to participate and be heard, court decisions have already taken care of this. In some respects the FCC, in my opinion, is entirely too liberal but this goes back to the controversy over the meaning of "public interest, convenience or necessity" whether it applies to programs, and you are entitled to be heard on such matters.

The second sentence of Section 9(b) requires that a licensee be given opportunity to demonstrate or achieve compliance with all lawful requirements before he is deprived of his license by "withdrawal, suspension, revocation or annulment." Unless the word "withdrawal" means more than I am afraid the courts will hold, deprivation of license by refusal to renew is not included. As I have already pointed out, revocation proceedings are very rare. It is on renewal proceedings that procedural safeguards, if they are possible, are most vitally needed. In a sense, however, the FCC is doing too much of the very thing which this sentence seems to require, leading to a wholesale process of censorship by means of renewal proceedings. I don't know what the answer is except to confine all disciplinary action to revocation proceedings.

The last sentence may prove very helpful. The last sentence of Section 9(b) is not going to make any difference in existing practice. It provides that where timely application has been made for a renewal, the license shall not expire until the application has been finally determined. The FCC's practice for years has been to grant temporary extensions until it has made its decision. The real trouble has occurred after the decision is in the *interim* preceding

the taking of an appeal and getting effective interim relief from the reviewing court. There have been decisions, particularly by the Federal Radio Commission in the early days, where a renewal was denied effective on the same date that the decision was made.

These comments on Section 9 are not intended by way of criticism. The real trouble, of course, is the use of a renewal proceeding as a method of discipline and punishment. If administrative agencies are to be held to have recourse to this sanction, the question of adequate procedural safeguards is tough, perhaps insoluble.

I have told you how, on September 4, 1946, the Commission published its very thorough-going revision. It was designed to comply with all the provisions of the Administrative Procedure Act except Sections 5(c), 7, 8 and 11. On December 10, 1946 it published a further revision designed to comply with these three sections which became effective December 11. It has done nothing so far, of course, to comply with Section 11 which does not become effective until June 11, 1947.

The provisions of Section 5 other than 5(c) may be disposed of very briefly. While compliance with them required or led to some changes in the FCC's rules they did not lead to any great change in the actual situation.

New rules were inserted following pretty much the exact language of Sections 5(a) and 5(b) covering notice and procedure (Sections 1.803 and 1.814). The Commission already had been in practice following the requirements in these respects for a long time. As for Section 5(d), authorizing the agency to issue declaratory orders the act led to a new rule (Section 1.728) following the language of the statute. In my opinion the Commission already had this power but it had largely refrained from making use of it. So Section 5(d) may have accomplished something.

Section 5(c) covering separation of functions, brings us to the more recent revision of December 10. Here it is

appropriate to notice the exception appearing in the last sentence, providing that it shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers. The same exception as to applications for initial licenses appears again in Section 7(c), covering evidence. This has led to a curious distinction between kinds of applications at the FCC. Applications for a construction permit for a new station are clearly exempt from these two sections. Applications for licenses following the construction of stations pursuant to permits are in a doubtful zone but are assumed by the FCC to fall in the same classification as applications for construction permits. I would have thought that applications to modify a license would not be considered as an application for initial license but the FCC so considers it.

In any event, in giving effect to Section 5(c) on separation of functions the Commission has applied it only to applications for renewal of license, applications for assignment or transfer of control, proceedings to revoke or suspend, proceedings initiated by the Commission on its own motion, or by any person other than the licensee, to modify a license, and proceedings in which any of these matters has been consolidated for hearing with matters not listed.

In announcing the revision the FCC calls attention to the two classes of hearings resulting from the distinction and states that it

has given serious consideration to the advisability of applying the separation of functions provisions of the Administrative Procedure Act to all 3 hearings conducted by the Commission

It goes on to say, however, that it decided not to do so at this time because of the heavy work load confronting it. The result is that, as the new regulation now reads, applications for construction permit, and for license, or for modification of license are not included. Neither are any of the proceedings under the common carrier provision

of the act. Neither are provisions under the portion of the act relating to radio equipment and radio operators on board ship. Also is omitted another kind of application which I have left out of this discussion having to do with the transmission of programs to be rebroadcast by foreign radio stations which are heard in the United States. This, it seems to me, is illogical both generally and in detail. I don't plan to take your time giving reasons but shall confine myself to saying that whatever considerations make for or against the requirement of separation of functions applies just as much to hearings on the matters that are excepted as to matters which are included. I doubt if the Commission's new regulation (Section 1.857) goes as far as required and intended by Section 5(c). The Commission's regulation is worth quoting:

Separation of functions.—(a) For hearings involving the matters listed in subsection (b) below, the Commission shall designate to preside therein one or more Commissioners, or other duly qualified officers. Such officers (except Commissioners) shall from the commencement of the hearing to the date of submission of their decisions and transfer of the cases to the Commission, be relieved of all other duties inconsistent with their duties and responsibilities as presiding officers. No such officers (except Commissioners) shall consult or confer with any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officers during such time, be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission.

You will notice that there is nothing in what I have read to prevent the Commission from appointing, as the hearing officer, a man who has previously been engaged in investigating and if you will, prosecuting the very same case or a factually related case. There is a shocking implication (which unfortunately corresponds to fact and long practice) that it is all right for a commissioner hearing a case to consult or confer with any person or party

on any fact and issue privately. The latter flows directly from the exception in Section 5(c) which says that it is not applicable to the agency or any member thereof. The door is thus wide open for continuation of the abuses of the past.

I shall pass over Section 6 of the Administrative Procedure Act since it does not have any important effects on the FCC.

In complying with Section 7 of the act, the FCC has adopted a regulation covering the designation of what it calls "presiding officers," using that term as the equivalent of the term "examiners" used in the act. In this section continues the practice of recent years during which the FCC has not maintained, as it formerly did, a separate body of examiners, but instead has drawn its presiding officers from its law department (Section 1.843). Provision is made for disqualification of the presiding officer with what appear to be adequate procedural stipulations.

In complying with Section 7(b) covering hearing powers, the FCC has substituted a much more elaborate section (Section 1.844) for its former rule, and has included the powers enumerated in the act with variations. For example, instead of providing that the presiding officer may "take or cause depositions to be taken whenever the ends of justice would be served thereby" the new section provides that he may "take or cause depositions to be taken when authorized by the Commission." As another example, instead of merely providing that the presiding officer shall have authority to "regulate the course of the hearing" the FCC goes further and adds that he may

maintain discipline and decorum, and exclude from the hearing any person found guilty of contemptuous conduct,

This provision for contempt is something new in FCC procedure.

With respect to Section 7(c) covering evidence, I have

already told you how applications for initial licenses (as construed by the FCC) have been in a measure excepted from its requirements. I do not regard this exception as serious since it merely allows the furnishing of evidence in written form "where the interest of any party will not be prejudiced thereby." There seems to be sufficient evidence of the intention of Congress to justify the conclusion that an agency may not avail itself of this exception in any cases where oral evidence is really desirable. The FCC has made no changes in its rules to comply with Section 7(c). It already had a substantial chapter of regulations on evidence (Section 1.871 to 1.881) which was somewhat elaborated last September. I am inclined to think, but I am not sure, that the Commission's regulations already incorporated just about all that was important in Section 7(c). I should add that in its revision last fall the Commission had a few provisions which do not seem important to this discussion.

Instead of providing for the exclusion of irrelevant material or unduly material the FCC's regulations provide (with exceptions that do not seem particularly important) that

rules of evidence governing the civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearing before the Commission. Such rules may be relaxed in any case where the ends of justice will be better served by so doing. (Section 1.871.)

This is pretty broad. A further regulation provides

The introduction of merely cumulative evidence shall be avoided, and the number of witnesses that may be heard in behalf of a party on any issue may be limited. (Section 1.872.)

You will have to judge for yourselves whether and how far these regulations depart from the intent of Congress.

There are also no provisions for carrying out other requirements of Section 7(c) such as the right of presenting a case by oral or documentary evidence, to submit

rebuttal evidence, and to cross-examine. Perhaps these are all implied.

With respect to Section 7(d) the FCC has avoided fully reflecting the requirements but perhaps unintentionally. Its regulations contained in the revision of September 10, is simply

the record shall include the transcript of testimony and exhibits, together with all papers and requests received for the record in the proceeding.

Section 7(d) prescribes what shall constitute "the exclusive record for decision." Notice the difference.

We now take up Section 8 of the act, entitled "Decisions." Section 8(a) entitled "Action by subordinates," has to do with the making of initial decisions by the presiding officer, or (subject to the discretion of the Commission), a recommended decision. Here again we encounter the broad exception of rule-making and applications for initial licenses. This goes to the heart of a controversy which has existed between two schools of thought as to FCC's practices. Since a sort of procedural resolution which was accepted in the year 1937-1939, while most of the FCC's hearings had been held before employees called "presiding officers" drawn usually from the law department, the first document resulting from a hearing has been known as "proposed decision" issued in the name of the Commission. This has been followed by opportunity for exceptions, briefs and oral argument after which the FCC has issued its final decision. The defects in this practice which I think are serious, I have discussed at length in articles in 1939 and 1940.

The point I now make is that this practice is preserved with all its shortcomings as to applications for initial licenses, not too much the common carrier proceedings which are classified as "rule-making."

In its new regulations of December 10 the FCC has given literal effect to Section 8(a) on those proceedings

which are not embraced in the exception. It has provided that in its order or notice containing the date and place of hearing it will specify whether the presiding officer shall prepare an intended decision or a recommended decision with respect to both its regulation. Section 1.851 seems to follow Section 8(a). They provide, however, that a recommended decision shall not be made public until further action by the Commission. In other words it will await the issuance of a proposed decision by the Commission, to be accompanied by publication of the recommended decision. This, I feel, does not accomplish what was intended. There is too much opportunity for accomplishing just what is done now, namely, persuading the presiding officer to make his report in accordance with what the FCC decides it wants. I do not know of any justification for keeping the recommended decision secret but cannot say that Section 8(a) forbids this. The regulations continue the practice of permitting exceptions, briefs and oral argument to both the initial decision by the presiding officer or FCC's recommended decision.

In giving you this description I think I have also covered all that need be said as to the FCC's compliance with Section 8(b) relating to "submittal and decisions." It seems to me that the Commission has fully complied with this subsection.

JUDICIAL REVIEW OF THE FCC'S DETERMINATIONS

Under Section 402 of the Communications Act there are two routes to the courts. Persons aggrieved by refusal of their applications for construction permit, for license or for renewal or modification of license, or by the granting of any such application, may appeal to the U. S. Court of Appeals for the District of Columbia and this court is subject to further review by the Supreme Court or certiorari. All other orders of the Commission are subject to review by three judge statutory courts under the Urgent Deficiencies Act, just as are orders of the Interstate Com-

merce Commission and various other agencies. This has led to a curious division of the jurisdiction to review. There are a number of matters distinctly relating to radio licensing which do not go to the Court of Appeals but go to the three judge statutory courts. Among them are applications for the Commission's approval of an assignment of license or transfer of control, applications for permission to transmit programs to a foreign radio station, revocation of license, and denial or revocation of operator's license. I cannot say that these are serious defects, or defects at all, but they have not, of course, been changed by the Administrative Procedure Act.

With respect to the cases that go to the Court of Appeals I find it difficult to reach any conclusion as to whether Section 10 of the Act adds appreciably to the scope of review now available. I appreciate, and fully believe, that the authors of the act have done everything possible within the latitude permitted by the Constitution to achieve a maximum of judicial review. Under the Communications Act the scope of review is covered by a proviso reading

that the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. (Section 402(e).)

Under this provision the courts, and particularly the Supreme Court, have succeeded in coming very close to eliminating any judicial review except on procedural matters. There is, I believe, reason for expecting that Section 10(e) of the Administrative Procedure Act will achieve a broader measure of review but only time will tell. Much depends on whether the Supreme Court follows the theory of "judicial activism" or "judicial self-denial."

With respect to review by the three judge statutory courts I feel that I have neither the necessary experience nor gift of prophecy to forecast the effect of Section 10(d).

So few cases have followed that route in matters of radio licensing. There have been others, of course, arising out of the Commission's determinations on common carriers.

As I have read the Supreme Court decisions regarding the scope of review under the Urgent Deficiencies Act, particularly the decisions of Mr. Justice Frankfurter, I have felt that there was a determined effort not only to limit the scope of review but to limit the cases in which any review at all may be had to those in which the usual equity requirements for an injunction must be made, namely, irreparable damage and no adequate remedy at law (see *Columbia Broadcasting System v. United States*, 316 U. S. 407, 62 Sup. Ct. 1194, 86 L. ed. 1563 (1942)). If I am right in this I think it follows that Section 10(e) not only will prove to have broader scope of review but also to increase the cases in which review is available.

From what I have said you will see that on the whole the Communications Act has not omitted to provide for judicial review. The principal question has been its scope. I have been able to give you only a vague answer as to how the scope will be affected.

Section 10 contains a provision as to interim relief which should be of help. For many years the Court of Appeals has made a practice of granting stay orders in attempts to preserve the status quo while it is reviewing decisions of the FCC. It has not been entirely consistent or very liberal but the power has been there. The Supreme Court, however, in a decision rendered by Mr. Justice Frankfurter (*Scripps Howard Radio Inc. v. FCC*, 316 U. S. 4, 14, 62 Sup. Ct. 875, 86 L. ed. 1229 (1941)), cast considerable doubt as to whether the Court of Appeals had any such power when its stay order is tantamount to the issuance of a license. If, for example, the Commission has rejected an application for renewal of license the Supreme Court implied that the Court of Appeals could not, by issuance of a stay order, keep the station in operation until the

appeal is determined. On its very face this is a rank injustice.

Section 10(d) of the act appears to do everything possible to remedy this so far as it can be done in general language. I trust it will prove sufficient for the purpose. It authorizes the reviewing court, under certain restrictions,

to issue all necessary and appropriate process to postpone the effected date of any agency action or to preserve status or right pending conclusion of the reviewing proceedings.

There is still too much room for the play of arbitrary action working a hardship. It is not exactly consistent that an FCC decision depriving a man of his property and livelihood should not be subject to interim relief comparable to what is available in connection with fines or terms of imprisonment. I am afraid, however, that this is another peculiarity and danger point inherent in the licensing system, particularly when renewal proceedings are employed for the purpose of discipline and punishment.

CONCLUSION

On the whole I would say that with perhaps a few exceptions, practices at the FCC have not been materially altered by the Administrative Procedure Act. This is due to several factors: (1) the fact that the Communications Act, as already construed by the courts, had reached fairly satisfactory results in interpreting the procedural requirements of the act, (2) the FCC had worked out these requirements in a rather elaborate set of regulations which already cover any of the points, (3) a large portion of the Commission's functions are exempt from some of the more important innovations in the act, and (4) the principal problems and dangers of the licensing system from the point of view of procedural safeguards, have not yet been sufficiently explored to permit of satisfactory statutory

solutions. Possibly through such solutions and possibly within the framework of a general statute such as the General Administrative Act and recourse to piecemeal attempts at remedies by amendment of the statutes under which the licensing system operates. In any event it is my earnest hope that at an early date the section on Administrative Law of the American Bar Association will continue its excellent work by concentrating attention on the peculiar procedural problems of licensing. I do not want to seem an alarmist but I cannot feel guilty of exaggerating when I say I believe that this system offers far and above the greatest threat to due process of law of any regulatory system administered by administrative agencies.

DISCUSSION PERIOD

FEBRUARY 3, 1947

The Session Convened at 3:30 p.m.

QUESTION: I would like to ask Mr. Caldwell whether the mimeographed material that he referred to is the same as that in rules published in the Federal Register on September 11, 1946?

MR. CALDWELL: Both sets of revised rules were published. The one I referred to as issued on September 4 was published in the Register on September 11. The one issued on December 10 was published, I think, on December 11. At any rate, they were published. The Commission has always done a fairly good job in publishing all rules, regulations and notices in the Register. It does not publish its decisions in the Register. There is no requirement that it do that.

QUESTION: Are the rules of September 11, 1946, available in some convenient printed form through the office of the Commission, other than in the Federal Register?

MR. CALDWELL: Yes. This is the document. It comprises 137 pages plus some appendices. Theoretically it is available. You could not get one now because there has been such a demand for it and the Commission is getting behind on its mimeographing.

QUESTION: But there is no printed version of that other than the one you get in the Federal Register, is that right?

MR. CALDWELL: That is right. Usually, though, the Commission practice in its rule-making activities, is that they are first published in mimeographed form and eventually they get into printed form. Then there is a revision ever so often. I do not think there is any great complaint on that.

QUESTION: You mentioned that the Commission took the position that these applications for construction permits, applications for the initial license and applications for renewals were all initial licenses, is that correct?

MR. CALDWELL: No. For modification. If I said renewal, I misspoke myself.

QUESTION: For modification? Maybe I did not understand you. Do you think that is a correct interpretation? I thought from something you said you thought it was not correct and I was wondering why?

MR. CALDWELL: The application for construction permit is, I agree, an application for an initial license. I would say the subsequent application requesting a license pursuant to the permit is in a doubtful zone. What really happens is this. When your application for a construction permit is granted, the permit always contains certain conditions with which you must comply. Then something occurs later which makes the Commission think that you should not have a license, and you go through a further hearing. So it is not an initial proceeding; it is a second and potentially an accusatory proceeding. But call that doubtful.

The application for modification, I think, clearly should not be called an original application. That is a case where an existing station, say WEAf, applies to change its frequency from 660kc. to 650 kc. The moment it does that, other stations will oppose it. This leads to an extended hearing in which the deeds and misdeeds of the parties will be brought out and there may be a lot of charges flying back and forth. In any event that, to me, is not an initial application.

QUESTION: What is the theory? What is the distinction? Why is it thought that there ought to be an exception in one case and not the other? There is no real controversy.

MR. CALDWELL: There was a very lively discussion before the American Bar Committee in which I had some part. There was a suggestion that the exceptions embrace all license applications. The result of the discussion was to limit the exceptions to initial applications.

The reason behind it was that the Interstate Commerce Commission and perhaps other agencies wanted to be kept out of these requirements as much as possible. Certificates of convenience and necessity are, by definition in the Act, made licenses. To take care of that situation those exceptions were made. It was not particularly for the benefit of the Federal Communications Commission. So, to answer your question generally, it was because of the field of public utility regulation, I think, that those exceptions were made.

Frankly, I do not think the distinction between application for initial licenses and other license applications is justified.

QUESTION: In terms of the objections that have been advanced against a combination of functions, that you cannot get an unprejudiced determination if the same persons engage in successive stages of the proceeding, is there any reason along those terms for distinguishing between the initial licensing proceeding and a modification, say?

MR. CALDWELL: I do not want to speak dogmatically about other agencies with which I am not too familiar. I am familiar with both the common carrier side and the radio licensing side of the Federal Communications Commission. In my mind the evil is just as great or little in both kinds of applications. Let me illustrate. An initial application for a television or FM station is, more often than not, made by a person who already has a standard broadcasting station. I have been through some of the principal hearings on these initial applications for new television and FM stations. In each case the sins of the applicants as standard broadcast station operators have been charged against them in hearings on their applications for new stations. This Act calls them initial applications but they are not wholly so, at least in the sense of being free from accusatory aspects.

As one example, out in Los Angeles one of my clients, the licensee of station KFI, announced in February, 1945, that as of the first of the next month it would carry no more local commercial commentators. Those commentators and their friends formed a committee against KFI. Incidentally, it happened that three of the commentators were so-called liberals and three so-called conservatives and we spent part of the hearing trying to find out what that meant.

This same client applied for a new television station, and underwent a hearing on that application in May, 1946. I am not exaggerating when I say that over a day was devoted to that commentator issue. You may call that a new application but it was also a trial of the sins of KFI, an existing standard broadcast station.

I must carry that a little further. In many cases two or more people are competing for the same new broadcast facility, or at least one of them is asking for something which, if it is granted, makes it impossible for the other fellow to have what he wants, or one of them is asking for something which adversely affects one or more exist-

ing stations because of interference, etc. It is frequently said that these are not adversary proceedings. If they are not, I do not know what the word means. The applicants are competing with each other before a body of judges and it seems to me the same procedural safeguards should govern as are required on applications which are not for original licenses.

To me the chief evil, however, is not so much the prosecutor-judge combination (although that is important) as the fact that when you get a body of administrative officials who have to do such a variety of highly difficult technical work, and then load on them the job of being judges in all the controversies, the judicial work, namely, the work of reading evidence, records, briefs and all that, being the more tedious part, gets neglected in favor of the other work.

In other words the combination is too much for one man or group of men to handle. To me that is probably a greater evil than the prosecutor-judge complex.

QUESTION: I would like to go back, Mr. Caldwell, to an earlier part of your paper. You commented upon the vagueness of the standard under which the Commission operates. It obviously is vague. I appreciate that this question cannot be answered in a moment. But I would like some comment on it.

Do you have any suggestions at all as to how the job which you think a commission like the Federal Communications Commission can properly perform on a more detailed or readily understandable statute than the one you now have in the statute which would limit them, that is, to considerations of physical interference in such things as I understand some people would like to do?

MR. CALDWELL: Not quite as broadly as that sounds. Nearly every one concedes that the Commission must have a broad delegation of authority on the technical or physical aspects of radio, and, at least in connection with common carriers, on its economic aspects.

I have spent the last twenty years of my life doing very little, practically, but working before this Commission and its predecessor. I know that although I work fairly hard, it is more than I can do to keep up with the technical and economic problems which the Commission faces, and while they are, on the whole, good men, I feel safe in saying that none of them can do it. When they try to take on the esthetic job of judging whether a program is in the public interest, convenience or necessity, whatever that means, they are taking on something that cannot be handled on top of their other work, with the result that their first and principal job is not being done well.

So I would say that, either by amendment or by judicial interpretation, the Commission ought to be kept out of program regulation. If we have to have such an evil in this country let another board do it, not the board that has the technical and economic duties and problems.

Then, as a second answer, I would far rather have a regulation in advance saying you cannot broadcast horse-racing results or astrology or conservative commentators, or some other types of programs the Commission does not seem to like than I would to find out after a long hearing that there is a rule I did not know about and face a possible loss or threat of loss of my license. The Commission won't make rules on the subject, which is bad enough; it goes by the case-to-case common law method which has *ex post facto* effects. But I don't know how you can force an administrative agency to make rules on the subject.

QUESTION: To go back to the question on the separation of functions, do you think it would be feasible for any people or agency, other than the Commissioners themselves, to adjudicate or handle adjudication?

MR. CALDWELL: If the so-called independent commissions are to be preserved, I do not quarrel too greatly with the combination of powers provided you restore the independent examiner; that is, require the man who hears the

case to make a public report of his findings. In Washington, as you must know, the tremendous records that are piling up daily are not read by the commissioners. Many of the briefs are not read. All they hear is a twenty-minute argument or so about the case, that is, as far as the parties directly are concerned. These long hearings are not peculiar to the FCC. For example, one of the airlines which applied for a permit recently went through something like six or eight weeks of hearing, resulting in a tremendous record. Do you think that the Civil Aeronautics Board is ever going to read that record? You know the answer in advance. They won't. They will decide the case on something else. To me the man that hears that evidence ought to make the first findings. Then let the case go to the Commission.

But I do not feel that I can stop there. To me an independent commission is not the answer anyway. Limiting myself to my own field I feel that all agencies of transportation and communication might well be merged in a government department and then alongside that government department there might well be a separate adjudicatory agency, just as the Tax Court sits alongside the Treasury Department, to hear controverted cases. By this means you can achieve efficiency where it is needed and retain the advantage of having several heads engage in the deliberative or judicial functions where that is needed. But such a development is not going to come for some time, I am afraid.

Such a development would, in large measure, do away with the extensive and troublesome overlapping of jurisdiction between these agencies, such, for example, as exists between the FCC and the Civil Aeronautics Administration with respect to the use of radio in connection with aircraft. The uncertainties, delays and conflicting policies resulting from such overlapping are a potential power of great harm and injustice to the persons regulated and to the public.

EFFECT OF THE ADMINISTRATIVE PROCEDURE ACT UPON THE CIVIL AERONAUTICS BOARD

JOHN H. WANNER

REGULATORY FUNCTIONS OF CIVIL AERONAUTICS BOARD

The Civil Aeronautics Act of 1938,¹ which provides the basis for all federal regulation of civil aviation, originally provided for the creation of the Civil Aeronautics Authority, the Administrator, and the Air Safety Board. As originally constituted, the Administrator and the Air Safety Board both were "within" the Authority, and the Authority was an independent agency separate from any other agency or department of the Government.

Pursuant to the Reorganization Act of 1939, the Authority was reorganized effective June 30, 1940.² The five-member Authority was renamed the Civil Aeronautics Board. The Air Safety Board was abolished and its functions transferred to the Civil Aeronautics Board. The Administrator was transferred to the Department of Commerce and officially designated the Administrator of Civil Aeronautics, although his organization and personnel are frequently called the Civil Aeronautics Administration. The Civil Aeronautics Board is an independent agency and exercises its powers independently. The Board's decisions are final and not subject to review by the Department of Commerce or any executive department or agency with a single exception: certain Board decisions affecting international air transportation require the approval of the President. For the purposes of "administrative house-keeping," however, the Board is within the framework of the Department of Commerce and its principal offices are

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¹ 52 Stat. 973 (1938), 49 U. S. C. A. § 401 et seq.

² 53 Stat. 561 (1939); Reorganization Plan No. III, § 7, and Reorganization Plan No. IV, § 7; 5 U. S. C. A., following § 133 (t).

currently located in the Department of Commerce building in Washington. The Department supplies the Board with certain facilities and services. The Board, however, appoints and controls its own staff, authorizes its own expenditures, determines and supports its own budget estimates, and promulgates its policies and decisions without any supervision or control by the Secretary of Commerce or his Department.

The principal powers and duties of the Board which most directly affect the Administration are those of prescribing safety standards and rules and regulations concerning safety in air commerce and promulgated by the Board as Civil Air Regulations under the provisions of Title VI of the Act. The Board is responsible for fixing the standards for the issuance of all airman certificates, aircraft type, production, airworthiness and air agency certificates and is responsible for the standards under which air carrier operating certificates are issued. The Board is responsible for promulgating all air traffic rules, for fixing minimum standards for the operation of all classes of air carriers, and for adopting all other rules and standards necessary to the maintenance of safety in air commerce. Responsibility for applying and enforcing such standards and regulations of the Board is vested in the Administrator. Thus the Board as the rule-making body and the Administrator as the law-enforcement agent for safety in aviation have many kindred interests which require close association and cooperation.

In enforcing these rules and standards the Administrator, in the event he considers a fine by way of civil penalty inadequate to maintain safety and compliance with the rules, may institute action to suspend or revoke an airman certificate or any of the safety certificates, such as type, production, airworthiness or operating certificates or any air agency certificates. To do this the Administrator files a complaint with the Board alleging the facts which in

his opinion require action against the safety certificate.³ Under these proceedings the airman or the certificate holder affected is entitled to a hearing which is generally held in the place of respondent's residence. Without going into detail it is sufficient to say at this time that every safeguard is maintained in these proceedings to insure the respondent every opportunity for a full and complete hearing.

Another important branch of the Board's work arises from its jurisdiction to exercise economic regulation over air transportation pursuant to Title IV of the Aeronautics Act. This type of regulation is accomplished by the Board and its staff and does not require enforcement activities by the Administrator of Civil Aeronautics. Economic regulation does not apply to all members of the flying public but only to those who transport United States mail, or who engage as common carriers in the business of commercial carriage by aircraft between the states or internationally.

The functions of the Board under this power of economic regulation determine the character of the air transportation system within the United States and between this country and foreign lands. Thus, the Board determines the nature and extent of routes and services and the persons or companies who shall operate such routes and services. This regulation is accomplished through the issuance of certificates of public convenience and necessity authorizing air transportation by air carriers of United States nationality, and by the issuance of permits to foreign air carriers. The Board is the agency with which tariffs showing rates, fares and charges for air transportation are filed. The responsibility for assuring the public of adequate service by air carriers at fair and reasonable rates is vested in the Board, as is the determination of compensation to be paid by the Post Office Department for transportation of mail by air. Air car-

³ Section 609.

riers must maintain and file accounts, records, and reports in accordance with the Board's regulations. Certain business relationships between air carriers and other common carriers or between air carriers and other aviation activities are reviewed by the Board in the interest of the public. Similarly, officers and directors of air carriers must first receive the Board's approval before they may also become officers or directors of other common carriers or other aeronautical enterprises. The Board, and not the Federal Trade Commission, is responsible for remedying any unfair or deceptive practices or unfair methods of competition in air transportation by air carriers or foreign air carriers. Contracts and working agreements on a variety of subjects between air carriers, or between an air carrier and a foreign air carrier or any other carrier, are required to be filed with and approved or disapproved by the Board.

EFFECT OF SECTION 3

Turning to the provisions of the Administrative Procedure Act, Section 3 requires agencies to publish or make available information on administrative law and procedure. As stated in the Senate Report, "For the information and protection of the public wherever located, these provisions require agencies to take the mystery out of administrative procedure by stating it."⁴

The principal effect of Section 3 upon the Board was to require publication in the Federal Register of the material covered by Section 3(a). No comprehensive publication along this line had been attempted by the Board before the Administrative Procedure Act required it. This was quite a burdensome matter for many agencies. But the Civil Aeronautics Board has only one principal Act to administer, a total of about 400 employees, including a small field staff, and a substantial part of its activities

⁴ Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946), Legislative History of Administrative Procedure Act, p. 198.

consist of the regulation of only about 35 persons—the certificated carriers. As a result the publication of the Board's material, including all of the Board's Rules of Practice in economic cases, required only eleven pages of the Federal Register, or only one-half of the material published by the Federal Power Commission, National Labor Relations Board, and Securities and Exchange Commission, and one-seventh of the material published by the Office of Price Administration. At or about the time the material required by Section 3(a) was published, the Board also published complete revisions of its Rules of Practice in economic cases⁵ and in the safety causes.⁶ The revisions incorporated numerous minor and major changes made necessary by various sections of the Procedure Act.

Section 301.3(b) of the Board's regulations now provides for public inspection of all final opinions, orders and rules, as required by Section 3(b) of the Procedure Act. However, this merely advises the public of the long-standing practice of the Board, and the Procedure Act did not require any change in the Board's actual practice. It is doubtful that the scope of the material concerning actions taken by the Board required to be published or made available to public inspection was increased by the Procedure Act, for Section 205(d) of the Aeronautics Act requires that the Board "shall make a report in writing in all proceedings and investigations under this Act in which formal hearings have been held, and shall state in such report its conclusions together with its decision, order, or requirement in the premises"; and further requires that the Board "shall provide for the publication of such reports, and all other reports, orders, decisions, rules, and regulations issued by it under this Act in such form and manner as may be best adapted for public information and use." Thus the Board, in addition to the usual printed volumes of decisions in formal proceedings,

⁵ Part 285 of Regulations.

⁶ Part 97 of Regulations.

has always effected a wide distribution of its orders and rules when the small number of persons in the air transportation industry is taken into consideration. For example, every order relating to the economic, as distinguished from safety, aspects of the Board's work is mailed free of charge to a mailing list of over 700, and safety orders to a mailing list of a little under 700. That represents routine distribution, for many additional copies are mailed upon specific request.

The same general observation can be made with respect to Section 3(e) of the Procedure Act, which requires that "matters of official record . . . be made available." A considerable volume of reports, tariffs, schedules, agreements, financial and operating data is required to be filed with the Board and, except for confidential material, this has always been available for inspection to persons properly and directly concerned.

EFFECT OF SECTION 4

Section 4 of the Procedure Act relates to rule-making and is applicable to many of the Board's functions. In addition to the Board's general powers to "make and amend . . . general or special rules, regulations, and procedure . . ." under Section 205(a) of the Aeronautics Act, there are more than a score of provisions in the Aeronautics Act which authorize the Board to adopt, without statutory hearing, rules and regulations with respect to specific statutory powers.

It has been the custom of the Board for many years to circulate proposed drafts of regulations for comment prior to adoption. This was heretofore done by giving actual notice, i.e., by circulating a draft of a proposed regulation, usually with an explanatory memorandum, to the members of the industry and other interested persons. Comments concerning such proposals are invited and are then considered prior to adoption of the regulation by the Board. No great difficulty is experienced by the Board,

therefore, in taking an additional step pursuant to Section 4(a) of the Procedure Act and publishing a notice of the proposed rule-making in the Federal Register. Some of the regulations adopted by the Board since this section became effective have directly affected safety of operations in air commerce, and it was therefore necessary to put them into effect as quickly as possible once the need for the regulation had been established. In these cases the Board has taken advantage of the right, granted by the Procedure Act, to dispense with notice and public procedure if they are found to be "contrary to the public interest."

One of the most important rule-making proposals now before the Board involves a proposed revision of the regulation⁷ which exempts the noncertificated carriers, or non-scheduled carriers, as they are sometimes called, from many of the requirements of the Aeronautics Act. The first draft of this proposed revision was released with an opinion of the Board in May, 1946.⁸ After the receipt and consideration of comments, a new draft was circulated on November 22, 1946,⁹ and notice of proposed rule making was published in the Federal Register. Comments were invited to be filed by December 23, and the Board also heard oral argument for two days on January 6 and 7, 1947. The final regulation will be forthcoming in the near future.

The procedure in this instance, although not unique, involved more procedural steps than the usual case. As permitted by the Procedure Act, the Board has, on occasion, issued interpretative regulations without notice and made them immediately effective. The procedure varies from case to case, but is tailored to the importance, urgency, and effect of the proposal.

⁷ Section 292.1 of the Board's Economic Regulations.

⁸ Investigation of Nonscheduled Air Services, Docket No. 1501, decided May 17, 1946.

⁹ Economic Regulation Draft Release No. 14.

Section 4(b) of the Procedure Act provides in part that "Where rules are required by statute to be made on the record after an opportunity for an agency hearing, the requirements of Sections 7 and 8 shall apply in place of the provisions of this subsection." The principal classes of cases affected by this provision are the Board's rate cases in which the Board prescribes a rate for passengers, property or mail.¹⁰ The great majority of these cases have involved the fixing of the rate of compensation to be paid by the Federal Government for the carriage of the air mail by the certificated air carriers. Although the Board has power under the Aeronautics Act to fix a mail rate for a past period, and has done so in a number of cases, the function appears to be a true rule-making process and presumably will be considered as such by the Board.

ADJUDICATION

Except for the specified exceptions, Sections 5, 7 and 8 of the Procedure Act are applicable to cases of "adjudication required by statute to be determined on the record after opportunity for any agency hearing." There are approximately sixteen statutory provisions in the Aeronautics Act which require that individual cases involving adjudication be "determined on the record after opportunity for an agency hearing" within the meaning of the Procedure Act. In addition, there are eight additional statutory provisions relating to adjudication where no hearing is required by statute, but in which the Board as a matter of policy has always required a hearing, in which it normally or frequently requires a hearing, or in which it has always required a hearing before disapproving certain requested action. It is probable that in the majority of adjudication cases in which a hearing is actually held, the requirements of the Procedure Act will be substantially followed as a matter of agency practice.

¹⁰ Sections 406(a) and 1002.

By far the greatest volume of the Board's adjudication cases in which hearings are required by statute fall into two main groups.

First, on the safety side there are the suspension and revocation cases which arise under Section 609 of the Aeronautics Act. In these cases the Administrator files a complaint against airmen or others deemed to have violated a provision of the Aeronautics Act or the Civil Air Regulations. The cases are prosecuted by attorneys of the Administrator of Civil Aeronautics before an Examiner of the Board, and, if a violation is found to have occurred, result in an order of suspension or revocation of the airman or other certificate. These certificates are originally issued by the Administrator, but since their revocation or suspension is ordered by the Board the proceedings constitute adjudication within the meaning of the Procedure Act. With one minor exception,¹¹ these are the only cases in which formal hearing procedure must be used by the Board with respect to safety matters. Hearings held with respect to aircraft accidents are general investigations into facts, the hearing is not required by statute and no order is issued as a result of the hearing.

Second, another large group of adjudication cases involve applications for certificates of public convenience and necessity. The statute requires a hearing¹² and, if public convenience and necessity and other statutory requirements are found, the result is the issuance¹³ of a "license" within the meaning of the Procedure Act. Within this group of cases there should also be included proceedings for the issuance of the so-called "grandfather" certificates of public convenience and necessity;¹⁴ proceedings terminating the effectiveness of certificates of public con-

¹¹ Section 602 of the Aeronautics Act (see note 1 *supra*) requires a hearing by the Board on appeal from the refusal of the Administrator to issue an airman certificate.

¹² Section 401(c).

¹³ Section 401(d).

¹⁴ Section 401(e).

venience and necessity;¹⁵ proceedings for the alteration, amendment, modification, suspension, or revocation of such certificates;¹⁶ proceedings to authorize abandonment of a route or part thereof;¹⁷ and proceedings for the issuance, alteration, modification, amendment, suspension, cancellation, or revocation of permits which are issued to foreign air carriers authorizing them to engage in foreign air transportation.¹⁸ Although the factual and legal issues which arise in these proceedings differ due to the various statutory provisions relating to them, they all involve the grant, change or withdrawal of licenses to engage in air transportation, i.e., the carriage of mail or the common carriage of persons or property.

In view of the large number of agency proceedings in which the Aeronautics Act requires a hearing, it is not surprising that in the case of two or three of them there is some difficulty in deciding whether they involve rule making or adjudication.

One group of cases which gives rise to such doubts is the group falling under Section 408 of the Aeronautics Act, relating to consolidations, mergers, and acquisitions of control. Without trying to delineate precisely the scope of the section, it prohibits, without Board approval, an air carrier from merging or consolidating with, or purchasing, leasing or contracting to operate a substantial part of the properties of, or acquiring control of, another air carrier, a common carrier, or a person engaged in a phase of aeronautics; and, of course, prohibits without Board approval the reverse situations as well. When applications seeking such approval are heard the applicants present full details concerning the corporate and financial structure which they propose to establish if the transaction is approved; and the Board, in determining whether the transaction is in the public interest and in conformity with

¹⁵ Section 401(g).

¹⁶ Section 401(h).

¹⁷ Section 401(k).

¹⁸ Section 402.

the other provisos and requirements of Section 408(b) of the Act, may disapprove the transaction because such corporate and financial arrangements are not satisfactory, or may grant approval with conditions which relate to the corporate and financial arrangements between the parties to the transaction. The proceeding is therefore not unlike rule making involving approval for the future of corporate or financial structures. Despite the similarity to rule making, however, it would appear that the approval granted by the Board in such a case is a "license," and that the process is one of adjudication. The corporate and financial problems involved are merely incidental to or aspects of the principal issues in the case, namely, the questions of monopoly, competition and public interest.

A similar question arises under Section 416(b)(1) of the Aeronautics Act. That section authorizes the Board to exempt from the requirements of the Act any air carrier or class of air carriers if it finds that enforcement is or would be an undue burden on the carrier or class of air carriers. It is under that section, for example, that the Board is proposing to classify and subclassify the so-called nonscheduled carriers, and is proposing to exempt them from some of the requirements of the Act. This seems clearly rule making within the meaning of the Procedure Act, for the regulation would be an agency statement of general applicability and future effect designed to implement and prescribe both law and policy. On the other hand, many requests are received from individual carriers for relief from certain legal requirements applicable to local and limited situations. These are frequently decided on the basis of an existing state of facts, and the action taken by the Board is to grant a form of permission to the carrier. The order of the Board in such cases frequently grants permission to a carrier to do something which could also have been granted in a license proceeding, such as a proceeding for the amendment of a certificate of public convenience and necessity. It would appear,

therefore, that the broad exemption power applies to both the rule making and adjudication powers of the Board, and that it will be necessary to examine each action by the Board under the section in order to determine whether it constitutes rule making or adjudication.

The provisions of the Procedure Act relating to separation of functions have not proved to be particularly burdensome. The organization of the staff of the Board which has existed for many years past has mitigated difficulties in this respect. The Board has had a separate Office of Trial Examiners directly responsible to the Board which handles all economic, as distinguished from safety, regulatory cases. The examiners in safety cases involving the suspension or revocation of safety certificates are appointed from the General Counsel's staff. However, since the complaint is filed and prosecuted by another and independent branch of the Government—the Administrator of Civil Aeronautics—a separation of function exists here which goes beyond anything contemplated by the Procedure Act.

The separation of function requirements of the Procedure Act touches the staff of the Board at two important points, however. The economic enforcement work of the Board, which has not been extensive in the past, has been under the supervision of the General Counsel. If the General Counsel will wish to be free to advise the Board in the decision of an enforcement case he must, of course, abstain from the supervision of investigative and prosecuting functions in that and any factually related case. A similar situation exists in the Alaska office, where the Director, who is directly in charge of all functions of the Alaska office, may be called upon to supervise the investigative, prosecuting and examining work.

One interesting problem is presented by the exception in Section 5(c) which states that the separation of functions requirements "shall not apply in determining applications for initial licenses." If the term "initial license" is to be

taken literally to refer only to the original issuance of a certificate of public convenience and necessity, and not to the later amendment or modification of the certificate, the result would be a completely meaningless and erratic application of the subsection to the certification proceedings of the Board. For example, the Board frequently has proceedings in which one applicant may be seeking a new certificate between two points—such as New York and Boston—while another may be seeking a New York-Boston route as an extension of its existing Los Angeles-New York route. Likewise a carrier which desires to add Point X to its transcontinental route can either apply for an amendment of its existing certificate, or it can apply for a new certificate authorizing service between Point X and the cities on its existing route. These cases involving service to the same points or within the same area are usually consolidated and heard together. Moreover, an applicant will sometimes submit an application in the alternative—it is willing to receive either a new certificate or an extension of an old one. All of these applications involve the same factual and legal issues and it would be entirely illogical to require a separation of functions in the amendment and modification cases but not in the cases involving issuance of a new certificate.

That such a result was not the intention of Congress finds considerable support in the legislative history of the Act, which indicates that the exception was provided because applications for initial licenses are similar to rule making, which are not accusatory or disciplinary proceedings and therefore are not proceedings in which separation of function is required.¹⁹ Since these same considerations—that is, absence of accusatory and disciplinary factors—are applicable to amendments and modifications of certificates of public convenience and necessity, it would appear that such proceedings fall within the exception relating to initial licenses in Section 5(c) of the Procedure

¹⁹ Sen. Doc. 248, 79th Cong., 2d Sess. (1946) pp. 203-204, 262, 361.

Act. That section, however, would probably remain applicable to proceedings involving applications for the revocation, suspension or diminution of certificates of public convenience and necessity and foreign air carrier permits, and also to proceedings initiated by the Board itself for any purpose affecting the certificate, for in all of such cases there is present or is likely to be present some of the accusatory or disciplinary factors lacking in the initial license cases.

The provisions of Sections 7 and 8, and particularly Section 8(a), of the Procedure Act have brought about an important change in the handling of the safety suspension and revocation cases, and a change in the handling of economic cases which is one of form rather than substance. In the suspension and revocation cases provision has been made in the Rules of Practice for the issuance of initial decisions by the safety examiners. The nature of the proceeding lends itself to this type of treatment, and frequently the examiners will issue such decisions orally immediately following the close of the hearing. Experience to date shows that approximately 80% of these initial decisions are allowed to become final without appeal to the Board or review upon motion of the Board.

The general rule in all economic cases other than rate cases is to issue recommended decisions by the Examiner in lieu of the Examiner's Report formerly issued. In rate cases the former practice was to institute the proceedings by a show cause order. After opportunity for hearing before an examiner and argument, final decision by the Board was issued. No report or recommendation was made by the examiner. At the present time under the amended Rules of Practice the former procedure is retained except that provision is made for an additional step, namely, a tentative decision by the Board after the opportunity for hearing and argument has been given.

As a result of these changes in procedure, you will note that the Board in three different types of cases utilizes

the three principal procedural processes established by Section 8(a) of the Procedure Act—initial decisions by the hearing officer in suspension and revocation cases, tentative decisions by the agency in rate cases, and recommended decisions by the hearing officer in other economic regulatory cases.

JUDICIAL REVIEW

Section 1006 of the Civil Aeronautics Act provides that "Any order . . . issued by the Board under this Act . . . shall be subject to review by the Circuit Court of Appeal of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order."

The memoranda of the Attorney General incorporated in legislative history of the Procedure Act state his opinion that the provisions on judicial review in Section 10 are largely declaratory of existing law.²⁰ Section 1006 of the Civil Aeronautics Act, although differing in some respects from the review provisions applicable to other agencies, is similar to them. It would appear, therefore, that the Procedure Act will not greatly change the judicial review provisions formerly applicable to the Board.

One of the exceptions to Section 10 of the Procedure Act is where "statutes preclude judicial review." There is one class of cases specifically exempt under the Civil Aeronautics Act. The review provisions of Section 1006 are applicable to any order issued by the Board "except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this act." As a result the issuance, amendment, revocation, etc., of the operating permits of the foreign air carriers are not subject to judicial review.

Prior to the passage of the Procedure Act, another class of cases arising under the Civil Aeronautics Act has been

²⁰ Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) pp. 413 and 415.

held not subject to judicial review, namely, certain cases subject to Presidential approval under Section 801 of the Aeronautics Act. These include the issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in any certificate of public convenience and necessity for foreign or overseas air transportation issued to an air carrier (Pan American Airways, for example).

This doctrine had its origin in *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F. (2d) 810 (C. C. A., 2d, 1941), which involved a petition to review an order of the Board, approved by the President, authorizing the issuance of a certificate of public convenience and necessity for foreign air transportation. The court held that in such cases the President must frequently act on information which was not before the Board, that the Board is nothing more than the President's adviser, and that his necessary approval makes him, and not the Board, the ultimate arbiter. The court then said that "It seems incredible that in enacting Section 1006(a) Congress intended to permit a review of the action of the Board in cases where the authority vested in the President . . . would necessarily render our review futile. . . . The review of the order authorizing the issuance of the certificates is so dependent upon considerations which are within Executive discretion that it cannot be regarded as authorized by Section 1006(a)." A petition to review a similar case has been filed in the Circuit Court of Appeals for the 5th Circuit and was argued recently.²¹ It may result in further clarification of this doctrine, and of the impact of the Procedure Act upon it.

The second exception to Section 10 of the Procedure Act is where "agency action is by law committed to agency discretion." The legislative history indicates that this refers primarily to cases where the agency in its discre-

²¹ *Waterman Steamship Corp. v. Civil Aeronautics Board*, C. C. A., 5th, No. 11765.

tion could institute or refrain from instituting the proceeding. The National Labor Relations Board has been cited as an example of an agency possessing such discretionary power under Section 10 of its Act, which provides that "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint. . . ."

Similar discretionary power would appear to vest in the Civil Aeronautics Board under certain of the provisions of Section 401(h) of the Aeronautics Act, which provides in part that "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate [of public convenience and necessity], in whole or in part, if the public convenience and necessity so require, . . ." On the basis of the mandatory provisions of the Civil Aeronautics Act relating to the original issuance of certificates of public convenience and necessity²² it would appear that the Board has statutory authority to dismiss in its discretion petitions or complaints filed by municipalities and others under this section, and that such action would not be subject to judicial review.

Section 1006 of the Aeronautics Act authorizes a petition for review to be filed "by any person disclosing a substantial interest in such order." Section 10(a) of the Procedure Act provides that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." It seems unlikely that the Procedure Act has materially changed the degree of interest required by the appellant in order to obtain review. The Board on brief in one of its cases argued that "By the phrase 'disclosing a substantial interest' it would seem that Congress intended to require at least a clear showing by the party

²² Section 401(d).

seeking review that it would be adversely affected in a direct fashion and to a material degree by the order sought to be reviewed.”²³ And in the only case in which a court has passed upon the meaning of the language of Section 1006 it was held that the appellant “had a substantial interest in the issue of a certificate because it would be *adversely affected* by the division of traffic to a prospective competitor”²⁴ [emphasis supplied].

Section 10(c) of the Procedure Act provides in part that “Except as otherwise expressly required by statute, agency action otherwise final shall be final . . . whether or not there has been presented or determined any application . . . for any form of reconsideration.” Whether the Aeronautics Act expressly requires such an application within the meaning of the Procedure Act is doubtful, although there is some grounds for an argument to the contrary. No specific mention of petitions for rehearing or reconsideration is made in the Aeronautics Act. However, Section 1006(d) of that Act does provide that “No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board, or, if it was not so urged, unless there were reasonable grounds for failure to do so,” and the Board has in fact provided in its Rules of Practice for petitions for reconsideration. In *Braniff Airways, Inc. v. Civil Aeronautics Board*²⁵ the United States Court of Appeals for the District of Columbia had before it a case in which the petition for review of the Board’s order was filed more than sixty days after the Board’s original order and decision, but within sixty days after the Board had denied a motion for rehearing. The court, after noting the absence of express provision for rehearing, held that it could not review an order until administrative

²³ Brief of Respondent Civil Aeronautics Board, p. 10, *W. R. Grace & Co. v. Civil Aeronautics Board*, 154 F. (2d) 271 (C. C. A. 2d, 1946).

²⁴ *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F. (2d) 810, 813 (C. C. A. 2d, 1941).

²⁵ 147 F. (2d) 152 (U. S. C. A. D. C., 1945).

remedies had been exhausted, and that for purposes of review, therefore, there was no final order until the rehearing was denied. The court cited a case involving the Federal Communications Commission in support of this proposition,²⁶ although under that Act specific provision for rehearing is made.²⁷

CONCLUSIONS

The Civil Aeronautics Act is one of the most recent of the major comprehensive regulatory acts passed by Congress. The agency created by it is the youngest of the agencies which will be considered specifically and in some detail at this Institute. Congress in enacting the Act, and the Board in setting up its procedures, had the accumulated experience drawn from earlier acts and agencies. The foregoing discussion indicates that this has had two important results in so far as application of the Administrative Procedure Act is concerned.

First, the provisions of the Procedure Act touch and affect the Civil Aeronautics Board in a very substantial proportion of its functions.

Second, because of safeguards already in the Aeronautics Act and the practices established voluntarily by the Board, no drastic changes were required in the Board's procedures and methods by reason of the Procedure Act.

DISCUSSION PERIOD

FEBRUARY 3, 1947

The Session Convened at 4:45 p.m.

QUESTION: I would like to get some clarification, if there is any to be had anywhere, of the meaning of the phrase, which creates an exception in favor of interpretative regu-

²⁶ Southland Industries v. FCC, 99 F. (2d) 117 (U. S. C. A. D. C., 1938).

²⁷ 48 Stat. 1095 (1934), 47 U. S. C. A. § 405.

lations, that Mr. Caldwell referred to earlier in the afternoon. Does that problem arise in your Board?

MR. WANNER: Yes, it does. The Board has already passed one regulation which was called "interpretative." The regulation in question defines certain words used in certain certificates of public convenience and necessity which restrict operations by the air carrier. A very normal type of restriction in some of the Board's certificates requires that in serving a certain point the flight must originate or terminate at or beyond a certain other named point.

For example, one case that I recall is Eastern Airlines' certificate to serve Boston, which provides that in serving Boston the flight must originate at or beyond Richmond, Virginia, the purpose being, of course, to require through service to Boston rather than local service in competition with other local carriers.

With the variety and the number of certificates outstanding to individual air carriers, certain practices might grow up by which the true purpose of that requirement could be avoided and it therefore became necessary to pass interpretative regulations stating just what was meant by the phrases as used in the certificate. I would regard that as being the kind of regulation that is spoken of in that provision.

QUESTION: Therefore you did not give the full notice which would have been required in the case of a non-interpretative regulation?

MR. WANNER: We did not.

QUESTION: Without getting too deeply into the difficult problem of the unscheduled air operators, we know that numerous applications have been made by nonscheduled air operators who seek a determination as to whether or not they are scheduled or nonscheduled. In these instances we might be confused between the problem of rule-making

or of adjudication. In all of those applications I believe the Board has taken the view that all the hearings have been postponed. I do not believe any of them have been set for hearings. Would it be mandatory upon the Board, considering the Administrative Procedure Act and the Civil Aeronautics Act, to set them for hearing?

MR. WANNER: There are, I believe, on file with the Board certain grandfather applications. Are those the ones you are referring to?

QUESTION: No, those are service applications for a certificate of convenience and necessity. There are some ten or twenty that have been filed by the nonscheduled operators who are awaiting a determination of the fact as to whether they require authority or a certificate should they require authority?

MR. WANNER: I do not know the applications you mean.

QUESTION: How would you treat those?

MR. WANNER: The Board has certain applications on file in which the applicants seek alternatives. They seek either a certificate or an exemption. Are those the ones you mean?

QUESTION: Exactly.

MR. WANNER: The choice between the alternatives would be based pretty largely on policy and might therefore be rule making. In the Air Forwarder case, for instance, the Board has consolidated a very large number of air forwarder applications. I think the hearings will start here in New York on the 17th of February and I understand that a fair proportion of those applications call for either a certificate or an exemption. I believe they have been handled to date as adjudication questions. One difficulty is that even if the exemption were issued, it might be an individual exemption.

QUESTION: I would like to know whether or not the Administrative Procedure Act has caused any change in the function of Public Counsel for the Board?

MR. WANNER: The Act has not, but there has been a recent change in the function of Public Counsel in new route cases. Public Counsel formerly participated in the policy and the legal aspects of the case. But from now on they will participate only in the legal aspects. They take no position, for example, as to the choice between carriers.

QUESTION: Under the new route certification function provision in the Aeronautics Act, did not Public Counsel formerly make recommendations as to routes which would now be subject to the separation-of-function provisions of the Administrative Procedure Act?

MR. WANNER: He did, yes. But those were almost all initial license cases so I do not think those provisions would be applicable.

QUESTION: I believe you said that cases under Section 408 might be considered as either rule-making or adjudication, depending upon the nature of the issue involved. Is not the distinction between an adjudication and rule-making, whether it is going to be applicable to a particular case, rather than the type of issue which is raised?

MR. WANNER: I would assume normally it is the type of issue. I do not know that a hard and fast rule can be drawn in that respect.

It would seem to me, however, that the Section 408 cases are really license cases. It is a form of permit, perhaps even more so than in convenience and necessity cases. Certificates of public convenience and necessity are continuing authorizations setting forth policy, terms and conditions and so on into the future, whereas the 408 cases normally grant approval for an action which is then immediately accomplished.

QUESTION: That interpretation would be an adjudication rather than rule-making?

MR. WANNER: That is right. It was the cases under 416 that I had even greater doubt about. It seems to me those could be either or both.

QUESTION: Is there any special problem presented for you in that respect by the definition of "rule" and "rule-making"? It seems to me you start on a peculiar definition of the term "rule" to include a statement of general or particular applicability in the future.

MR. WANNER: Yes.

QUESTION: You do not ordinarily conceive of a so-called statement of particular applicability as being a rule, whether or not the effect is in the future. Is the application of that part of the definition a matter of concern to you?

MR. WANNER: Yes, it is, particularly since apparently the structure of the Act is to first determine what is rule-making, and then what is not rule-making is called adjudication.

QUESTION: What do you make of that? Do you have any tentative views on it? Does it mean what it says? It is a very surprising provision we find here.

MR. WANNER: The definitions will be applied primarily in connection with specific problems and specific statutory provisions of the Aeronautics Act. Therefore I will not indulge now in too much theorizing on the meaning of it.

QUESTION: In any event you may have what you call a rule for the purpose of this Act, even though the effect is on a particular carrier?

MR. WANNER: Yes. That is true of the Board's rate orders which apply only to particular carriers, and I assume some of the SEC orders likewise.

QUESTION: Rate orders are treated exceptionally anyhow in the Act, are they not?

MR. WANNER: Yes. I have thought that all the rate orders are rule making, whether or not a hearing is had.

QUESTION: Do you know of any of the reasons for the exception in the last clause to 5(c) which provides that the members of the agency are excepted from the separation of functions? What was the reason for excepting members?

MR. WANNER: As I recall it, that is a very necessary, almost an essential exception because the members of the agency must of necessity know and control and be in touch with all the affairs of the agency.

QUESTION: You mean by that that they must participate in the determination as to whether a complaint will be filed on a particular person which may lead to revocation of the permit or something?

MR. WANNER: Possibly not, no.

QUESTION: Or form ultimately the general policy pursuant to which the complaint is made?

MR. WANNER: I assume the last clause of 5(c) would have reference primarily to the decision powers and functions.

QUESTION: It seems to me that a member who sits as a judge should not have anything to do with some of those other functions. I do not see why he is excepted.

MR. WANNER: Perhaps he should not be. But it has not been the practice of the Board to have a Board member sit as a separate hearing officer in Board cases. So there presumably will not be much of a problem as far as the Board is concerned.

QUESTION: Exactly what is the relationship between the Administrator and the Board, if you can explain it briefly?

I gather from what you say that they are quite independent of one another. Is the Administrator appointed separately by the President and similarly the members of the Board?

MR. WANNER: Yes.

QUESTION: Do their terms coincide?

MR. WANNER: The terms of the members of the Board are staggered, of course. They expire in different years. I forget the term of the Administrator.

In general, I think, the best shorthand method of stating the difference is to say that the Board is the legislative rule making body and the Administrator is the law enforcement agent. He carries out the rules that the Board adopts and the policies that the Board establishes.

QUESTION: But if you have a suspension or revocation proceeding, the Board makes the decision?

MR. WANNER: Yes. In that sense the Board is a judicial body as well.

There is one other class of case which I did not mention, and that is that under Section 602(b), an appeal lies to the Board if the Administrator refuses to issue a safety certificate in the first instance. That requires a hearing also. Oddly enough, there is no statutory provision for appeal to the Board if the Administrator refuses any other type of certificate, such as production, airworthiness, type certificate, and so on.

QUESTION: In referring to judicial review of Board decisions on the amendment of certificates under Section 401(h) I believe you said it seemed you were not subject to review under Section 10. You are confining that, I take it, to a case where the Board decides not to amend a certificate?

MR. WANNER: No, to a case where the Board decides not to institute a proceeding at all.

QUESTION: The general parts of the judicial review section seem to contemplate review in many instances of failure of an agency to act, the term "agency action" being defined, apparently, to include inaction as well as action. You take this particular function under 401(h) out of that by stressing the discretionary power of the Board, is that right?

MR. WANNER: That is right, as distinguished from the provisions under Section 401(d) which require that the Board issue original certificates if the Board finds the statutory standards have been met.

QUESTION: I would suppose that statutory provisions under which an agency might or might not initiate action of some sort will ordinarily read in terms of authority rather than duty if you are going to just stress the word "may" or the word "shall." I do not know the exact language of 401(h), but is there anything other than the use of the word "may" that leads to your conclusion?

MR. WANNER: The word "may" in 401(h) as distinguished from "shall" in 401(d). I think also that those two provisions, 401(h) and (d), are comparable to or drawn from similar provisions in the Interstate Commerce Act which have been so interpreted.

The Board took the position that it had absolute discretion with respect to a proceeding instituted by it pursuant to this section in a brief in one of its appeal cases. But the point was not squarely decided one way or the other by the court.

QUESTION: I believe you said that under that section the Board could dismiss cases which were originated by cities or municipalities, as distinguished from those originated by carriers or applicants. What is that distinction based upon, because the language is the same?

MR. WANNER: It may be that the Board could also dismiss petitions brought by air carriers who, however, are

not barred from relief because they can file under 401(d), and perhaps the application under 401(d) could also take the form of a request for an amendment, although that section is phrased as an original permit section. You will recall that in all cases where an air carrier files under 401(h) the Board has, nevertheless, gone ahead and found, for instance, fitness, willingness and ability, although that standard is not in 401(h) and is in 401(d). In other words, the Board has treated all such applications by carriers as being of the same kind, as though they had been filed under 401(d).

QUESTION: If you want to reserve your right to appeal you had better file under both from now on.

MR. WANNER: You mean the carrier? Out of abundance of caution, perhaps yes.

QUESTION: I just want to assure myself of one statement. If the manufacturer is unable to obtain a type certificate for a plane that he wishes to manufacture and he feels that that decision is arbitrary or capricious, he has no appeal to CAB, is that right?

MR. WANNER: Not to the CAB under any statutory provision that I know of.

QUESTION: Is that permission granted? Have you run into any of those cases?

MR. WANNER: I do not know. I am not familiar with that aspect of the work. In fact, I inquired to find out whether any provisions of the Aeronautics Act had been construed to cover that situation and found that there had not been, but perhaps there was a possibility of it. As far as I know, it has not been tried.

QUESTION: Does the Administrative Procedure Act change in any way the procedure to be followed in connection with a situation where a carrier and the Board

are in disagreement as to the extent of a certificate or an exemption under the Aeronautics Act?

MR. WANNER: There is provision for review, if the carrier disagrees with the Board's decision.

QUESTION: I mean the procedure of determining it?

MR. WANNER: The procedure before the Board?

QUESTION: Yes. Will that be brought on by an order issued by the Board, an order to show cause?

MR. WANNER: No. That procedure has not been substantially changed. There have been changes in the rules of practice which have been made because of various provisions of the Procedure Act. But they do not change essentially the nature of the proceeding which formerly was to have an examiner issue an examiner's report, followed by briefs, exceptions, oral argument before the Board and then a final decision by the Board. That same general procedure will be followed by having the examiners issue a recommended decision followed by briefs, exceptions, argument, and under the Procedure Act, an initial decision.

THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE BUREAU OF INTERNAL REVENUE

RALPH H. DWAN

GENERAL

According to the outline which I am supposed to follow, I should first state the "regulatory functions" of the Bureau of Internal Revenue. That puts me in a position like that of the professor of history who was invited to give a lecture on the private life of Catherine of Russia. He started his lecture as follows: "Gentlemen, I am to lecture on the private life of Catherine of Russia; gentlemen, Catherine of Russia had no private life." So, I might say, the Bureau of Internal Revenue has no regulatory functions. That would be true in the sense that, with few exceptions, the Bureau does not operate under broad legislative delegations of authority with only general legislative standards. The internal revenue statutes are usually very specific. Moreover, from an intra-governmental standpoint, the Treasury Department, of which the Bureau is a part, is essentially a service agency for the government as a whole, its principal function being to provide the funds for the rest of the government by collecting the revenues and, if necessary, borrowing the difference between those revenues and the operating expenses of the government. The internal revenue regulations are not ends in themselves but only means to the end of collecting the revenue.

On the other hand, the revenue laws and their administration do "regulate" in the sense that they affect the activities of millions of people—as well as their pocket-books. In the fiscal year ending June 30, 1946, the grand total of all kinds of income tax returns filed reached the astonishing figure of 80,525,837 and the internal revenue collections of all kinds totaled \$40,672,096,997.88.

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An old and well-established agency like the Bureau of Internal Revenue has developed its own ways of doing things as the result of experience over the years. The Bureau has a number of useful administrative procedures which are authorized by statutes other than the Administrative Procedure Act. Two of them may be mentioned briefly. The first is analogous to the "declaratory orders" authorized in Section 5(d) of the Act. Section 3760 of the Internal Revenue Code authorizes "closing agreements" between the Commissioner and the taxpayer for "any taxable period," and provides for finality of such agreements upon approval of the Secretary, Under Secretary, or an Assistant Secretary, in the absence of fraud. This provision can be and is used for the final determination of the tax consequences of prospective transactions. Another provision of the Internal Revenue Code, section 3791(b), authorizes the Commissioner, with the approval of the Secretary, to prescribe the extent to which any "ruling" or "regulation" shall be applied "without retroactive effect." That authority is frequently used to prevent unfairness where, for example, the taxpayer has relied on an earlier ruling or regulation.

One more preliminary observation may be made, at the risk of an appearance of smugness. In a speech before the Federal Bar Association, advocating a uniform Federal administrative procedure bill, made by E. Barrett Prettyman, now Associate Justice of the Court of Appeals for the District of Columbia, and at the time of making the speech Vice President of the Bar Association, District of Columbia, and formerly General Counsel of the Bureau of Internal Revenue, it was stated:

The plain fact of the matter is that in all our government there is no more efficient system than the collection of the federal revenue. And that system is built upon full notice of the issues involved, a hearing in fact as well as in form, a complete separation of functions, a decision by the person hearing the dispute, a decision restricted to facts openly exposed on the record, and a complete

judicial review. Thus it has been demonstrated in practice that this most unpopular, most complicated of governmental processes, can be, and actually is, conducted with the utmost efficiency upon the principles enunciated in the measures we are discussing tonight.

Now, as to the application of the parts of the Act to the Bureau of Internal Revenue, it may be stated generally that Section 3 relating to public information applies without limitation as to organization and procedure but otherwise requires little change in Bureau practice; that Section 4, relating to rule making, applies technically only to a limited extent but in practice is being applied quite broadly; and that the subsequent sections of the Act do not materially affect the established practices of the Bureau except with respect to certain functions of the Alcohol Tax Unit of the Bureau. The general statement just made will now be elaborated.

SECTION 3—PUBLIC INFORMATION

For many years there has been a veritable flood of public information about the Bureau of Internal Revenue and its activities; in fact, it has been almost impossible for busy men to keep up with the output of the Bureau itself and the various private organizations publishing tax services, bulletins, weekly letters and the like, not to mention the law reviews. That is not to say that compliance with Section 3 has not had considerable value already. I am inclined to think that the greatest value has been in the education of the Bureau personnel who have done the work. Parenthetically, the same thing perhaps may be said of other worthy undertakings such as the preparation of the Restatements by the American Law Institute, the publication of law school reviews, the drafting of statutes by the Commissioners on Uniform State Laws, and even the drafting of the Administrative Procedure Act itself. In the Bureau itself the work has given some men a broader perspective than they would get from their regu-

lar assignments, which are often over-specialized. Then, too, the material should be informative to other Bureau personnel, especially new members, to students, and even to those tax practioners who find time to read it.

The statement of the Bureau's organization and procedure, required by Section 3(a)(1) and (2), was published in the Federal Register, 11 Fed. Reg. 177A-22 to 177A-66 (Sept. 11, 1946), contained in Part II, Section 1, which may be procured from the Government Printing Office for 40 cents. (Typographical and other technical errors were corrected by a statement in the Federal Register, 11 Fed. Reg. 14261, Dec. 12, 1946). This statement is a complete though general description of the Bureau's central and field organization and its procedure. The most striking aspect of the statement is the extent of the decentralization established in 1939 with the plenary delegated authority in the field to dispose of particular cases. (See particularly Section 600.50 and Section 600.53 of the statement.) Another feature of interest is the listing of numerous forms prescribed by the Bureau for use by the public. In spite of the standard cartoons and jokes on the subject, the Bureau is rather proud of its forms. It is a great art to compress a complicated statute into a form, and it is remarkable how well the job has been done. In recent years, the statutes and regulations have been framed to make the forms as simple and easily understood as possible. Income Tax Form W-2 is a triumph in form making.

Section 3(a)(3) requires publication in the Federal Register of:

Substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public.

Also to be considered in the same connection is Section 3(b) requiring the agency to publish or make available to public inspection "all rules." Since Section 3(b) does not require publication in the Federal Register,

the result on the face of the statute apparently is that certain rules must be published in the Federal Register, and all other rules must be published either in the Federal Register or in some other medium or made available to public inspection. The term "rule" is defined in Section 2(c) very broadly as including "any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." In view of this very broad definition of the term "rule," there was some apprehension that the multitude of interpretative rulings issued by the Bureau, estimated as averaging nearly 1,000 weekly, would have to be published or made available to public inspection. It would have been inconsistent with the policy indicated by certain provisions of the Internal Revenue Code, requiring confidential treatment of information obtained in the administration of the internal revenue laws, to have published or made available to public inspection these rulings in the form in which rendered, since that would have disclosed the private affairs of the person to whom the ruling was rendered. It would, therefore, have been necessary to employ a large staff to edit the rulings by substituting symbols for names and other identifying data. Those who have read in the Internal Revenue Bulletin or in the tax service or elsewhere individual rulings prepared for publication as Chief Counsel's memoranda, and so-called I. T.'s, S. T.'s, etc., will realize what a task it would have been to prepare similarly a grist of 1,000 rulings weekly. Few of the rulings are of general interest, and those which are deemed of general interest are published. However, ground for excluding "rulings" from the classification of "rules" is found in a statement, relative to Section 3(b), found in both the House and Senate Committee Reports. This statement is that rulings "are neither rules nor orders." See also the statement of Congressman Walter, who, in discussing the definition of "rule" contained in Section 2(c) of the bill in his presentation to the House of Repre-

sentatives, said, "Advisory interpretative rules in particular cases, however, are not 'rules' within this definition" (92 Cong. Rec. 5649, May 23, 1946).

It being thus established that rulings are not required to be published as "rules," one question still remained, namely, are rulings within the provision of Section 3(a)(3) requiring publication of "statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public?" The report of the House Committee in discussing Section 3(b) of the Act (the Senate Report in discussing the same matter being practically identical) states that "rulings—which are neither rules nor orders but are general interpretations, such as the opinions of agency counsel—if authoritative . . . would be covered by the third category in Section 3(a)." Taking this language at its full face value might have led to the conclusion that all authoritative interpretative rulings of the Bureau would have to be published as "interpretations" under Section 3(a)(3). This might have been worse than if they had been held to be rules. As rules it would have been sufficient to publish them in any medium (presumably the Internal Revenue Bulletin would have been selected) or merely make them available for public inspection. As "interpretations," publication in the Federal Register would have been required. Publication of the many rulings as "interpretations" was found unnecessary because Section 3(a)(3) requires publication only of "interpretations formulated and adopted by the agency for the guidance of the public." Apparently an interpretation made in an individual case is not "for the guidance of the public."

The Bureau has held that opinions of a Deputy Commissioner addressed to a particular taxpayer or upon a particular set of facts, all opinions of the Chief Counsel for the Bureau, all rulings of internal revenue agents, and the like, are not subject to the provisions of Section 3(a)(3) or Section 3(b) and need not be published in the

Federal Register, Internal Revenue Bureau Bulletin or elsewhere. However, to the extent deemed advisable, the Bureau voluntarily publishes rulings and Chief Counsel's memoranda in the Bulletin. Most of those withheld would, if they were disclosed, be found to be related to particular factual situations making them of little, if any, value, as guides in the settlement of other cases. And it should be recognized that in dealing with border line issues it is often desirable from the public as well as from the Government standpoint to withhold what may be only tentative opinion subject to change as later developments may indicate. To disclose in advance of the reaching of a settled position (all the intra-Bureau discussions leading up to the taking of such position) would frequently be misleading and productive of unnecessary controversy.

However, an occasional ruling may be considered as coming within the scope of Section 3(a)(3) and therefore required to be published in the Federal Register. Thus, a recent issue of the Internal Revenue Bulletin contains a Commissioner's mimeograph, approved by the Acting Secretary of the Treasury, relating to the income tax treatment of the payment of Federal stamp taxes. The mimeograph refers to an I. T. (Income Tax Unit ruling) issued in 1946 which changed the Bureau position on the subject, and the mimeograph states an administrative policy not to disturb returns filed for taxable years prior to the publication of the I. T. The mimeograph expressly refers to Section 3(a)(3) of the Administrative Procedure Act. (See Mim. 6083 (1947), 1 Int. Rev. Bulletin 2; also published in the December 7, 1946, 12 Fed. Reg. 14159, Dec. 7, 1946). That mimeograph, by the way, is a good example of the exercise of the power to limit the retroactivity of rulings under Section 3791(b) of the Internal Revenue Code, which I have mentioned above.

Of course, the internal revenue regulations, which are promulgated by the Commissioner and approved by the Secretary, are published in the Federal Register, as they

were before the enactment of the Administrative Procedure Act.

Section 3(b) of the Administrative Procedure Act requires agencies to publish or, pursuant to rule, make available to public inspection all final opinions or orders in the adjudication of cases except those held confidential for good cause and not cited as precedents. Section 3(c) provides that save as statutes may require otherwise or information may be held confidential for good cause, matters of official record shall be made available to persons properly and directly concerned. The term "order" as used in Section 3(b) is broadly defined by Section 2(d) of the Act as meaning "the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule-making but including licensing." The Bureau has held that a deficiency notice, the allowance or rejection of a claim for abatement, credit or refund, an acceptance or rejection of an offer in compromise, the execution of a closing agreement, and the scheduling of assessments and overassessments are "final opinions or orders," within the meaning of the Act. However, the Bureau is relieved of the burden of actually publishing the indicated opinions and orders by the parenthetical language of Section 3(b) excepting from the publication requirement opinions and orders "required for good cause to be held confidential, and not cited as precedents." There are sections of the Internal Revenue Code affording good cause for holding the orders of the Internal Revenue Bureau confidential. The sections are cited and the policy of the Bureau relative to Section 3(b) and (c) are stated in Section 600.1(b) of Part 600 of the statement of September 11, 1946. Section 600.1(b) reads, in part, as follows:

(2) Publication and public inspection.

(i) General. Sections 55, 2556, 2557, 2595, 3275 and 4047 of the Internal Revenue Code contain broad prohibitive and penal provisions against the disclosure of certain information described

therein obtained by the Bureau of Internal Revenue from members of the public in the performance of its functions. The above provisions necessitate severe limitations by the Bureau of Internal Revenue upon publication and public inspection of its official records, including final opinions or orders in particular cases. The extent to which public disclosure may be made of matters of official record to persons properly and directly concerned is set forth herein:

- (a) Inspection of Tax returns. . . .
- (b) Public lists of persons making income tax returns. . . .
- (c) Public lists of persons paying occupational taxes. . . .
- (d) Record of seizure and sale of real estate. . . .

(ii) Final opinions and orders. In conformity with the policy of the provisions of law referred to in paragraph (i), final opinions and orders in the adjudication of cases arising under the internal revenue laws are, with limited exception, treated by the Bureau as confidential and are not published nor made available for public inspection. The exceptions are:

- (a) Overassessments in excess of \$20,000. . . .
- (b) Excess profits tax relief—publication of allowances. . . .

(c) Publication of decisions. Rulings and decisions on matters arising under the internal revenue laws which because they announce a ruling or decision upon a novel question or upon a question in regard to which there exists no previously published ruling or decision, or for other reasons, are of such importance to be of general interest, or which revoke, amend or effect in any manner a published ruling or decision are, after rephrasing to eliminate any confidential information relating to a particular case, including identity of persons, regularly published in the Internal Revenue Bulletin. No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Bureau of Internal Revenue as a precedent in the disposition of other cases.

(iii) Rules. All rules relating to the functions of the Bureau of Internal Revenue other than those dealing solely with internal management will, to the extent consistent with the limitations contained in the provisions of law referred to in subdivision (i) of this subparagraph, be made available to public inspection. . . .

RULE-MAKING

Section 4(a) requires notice of proposed rule-making with certain exceptions. In the Bureau of Internal Revenue, questions of application of this provision arise principally in connection with what we call "regulations." Congress practically never imposes internal revenue tax liability without at the same time authorizing the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to issue "regulations" to make the law effective.

At the outset there is the matter of terminology. Section 4(a) uses the term "rule." Congressman Walter, in presenting the bill to the House of Representatives, discussed Section 2(c), which defines the term "rule," and said the following:

The definition of 'rule' and 'rule-making' in Section 2(c) is very important. It defines the legislative function of administrative agencies. Here I might say there is great confusion in the terms used in the field of administrative law. The word 'regulations' is sometimes improperly used to embrace the decisions of particular cases. Also, regulations are often called something other than rules or regulations. Thus we find that regulations specifying prices or rates are more often than not called orders. Similarly, Treasury regulations are customarily called decisions. To the person who is not expert in the field of administrative law, the confusion of terminology is baffling. From time to time new terms are invented, such as the word 'directive.'

In this bill the accepted analytical terminology has been adopted. Accordingly we speak of rule or rule-making whenever agencies are exercising legislative powers. We speak of orders and adjudications when they are doing things which courts otherwise do.—92 Cong. Rec. 5649 (May 23, 1946).

The Congressman's statement that "Treasury regulations are customarily called decisions" was technically not quite correct so far as the Bureau of Internal Revenue is concerned. The Bureau's principal regulations are called regulations. Amendments of the principal regula-

tions are made by Treasury decisions, or "T. D.'s," and sometimes a small regulation is issued as, or incorporated in, a Treasury decision. Nevertheless, within the Bureau of Internal Revenue a regulation is customarily called a regulation. See for instance the income tax regulations, known as Regulations 111.

A more serious problem of terminology arises in connection with the exceptions in Section 4(a), which requires distinctions to be made between different kinds of regulations (rules). In the above quotation from Congressman Walter, he was distinguishing between rules and adjudications and all rules were lumped together as the exercise of "legislative powers." He made a more discriminating statement in connection with Section 3(a) as follows:

The effect of this subsection [3(a)] will be to require all agencies to issue at least two rules or sets of rules—one respecting their organization and the other respecting their procedures. In addition where they are authorized to issue substantive rules—such as price regulations—or where they issue statements of policy—as in the Communications Commission—or interpretative rules—as in the Bureau of Internal Revenue—they would issue a third body of materials.—92 Cong. Rec., 5650 (May 23, 1946).

You will notice that in the quoted statement Mr. Walter referred to the Bureau of Internal Revenue as issuing interpretative rules. Section 4(a) makes an exception of "interpretative rules." The conception of interpretative rules or regulations is fairly well recognized by courts and writers. The writers often distinguish them from "legislative" rules or regulations, which are designed to carry out broad and general statutory directions. The Administrative Procedure Act does not use the term "legislative," but in Section 3(a) uses the term "substantive rules" and in Section 2(c), 3(a), and 4(a) speaks of agency "procedure" or "procedures." Is this the old law school distinction between substantive rules and procedural rules? More likely, in view of Congressman Walter's statement, last quoted, "substantive rules" are

legislative as distinguished from interpretative rules. Presumably, procedural rules could be either interpretative or substantive depending upon their statutory basis. There are other terms used which are none too exact.

As indicated by Congressman Walter, internal revenue regulations are, for the most part, interpretative in character. Other regulations of the Bureau are concerned principally with matters such as preparation and issuance of tax returns and other forms, fixing and extending the time for filing returns and other documents, prescribing the manner in which evidence necessary for the establishment of facts before the Bureau shall be presented, etc. Probably the best example of internal revenue regulations issued under a broad statutory direction are the regulations on consolidated returns, authorized by Section 141 of the Internal Revenue Code, as amended. The statute provides that an affiliated group of corporations shall have the privilege of making consolidated income and excess profits tax returns in lieu of separate returns, subject, however, to consent to the regulations. The Commissioner, with the approval of the Secretary, is directed to prescribe regulations to conform to the following standard:

. . . that the tax liability of any affiliated group of corporations making consolidated income- and excess-profits-tax returns and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income- and excess-profits-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability.

Under that rather general direction elaborate regulations have been prescribed. (These are Regulations 104 and 110.) The constitutional theory of this delegation of power is discussed in the Senate Committee Report on the similar provision in the bill which became the Revenue Act of

1928 (44 Stat. 9, 26 U. S. C. A. §§ 1, *etc.*). The Committee stated:

... The Committee believes it to be impracticable to attempt by legislation to prescribe the various detailed and complicated rules necessary to meet the many differing and complicated situations. Accordingly, it has found it necessary to delegate power to the Commissioner to prescribe regulations legislative in character covering them. The standard prescribed by the section keeps the delegation from being a delegation of pure legislative power, and is well within the rules established by the Supreme Court. ... Furthermore, the section requires that all the corporations joining in the filing of a consolidated return must consent to the regulations prescribed prior to the date on which the return is filed.

Another example of interest because of the emphasis upon the importance of forms in internal revenue administration is a recent Supreme Court case, *Commissioner of Internal Revenue v. Lane-Wells Co.*, 321 U. S. 219, 64 Sup. Ct. 511, 88 L. ed. 684 (1944). The applicable statute required a personal holding company to "make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe." The regulations required a "separate return" on Form 1120H. Failure to comply with that requirement was held to prevent the statute of limitations from starting to run and to result in a penalty for failure to file, even though the taxpayer had filed the usual corporation income tax returns on Form 1120. The court stated:

... Taxpayer says that the information called for by Form 1120H is information that could have been called for by Form 1120. We assume so, but we do not see how the fact helps the taxpayer, for the Treasury was fully within the statute in requiring that information in a separate return.

Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply. ... The purpose is not alone to get tax information in some form but also to get it with such uniformity,

completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished. For such purposes the regulation requiring two separate returns for these taxes was a reasonable and valid one. . . .

In the examples just given, the regulations are not primarily interpretative in character and therefore do not come within that exception in Section 4(a). Do they come within the exception as to rules of agency "procedure"? Probably not, particularly in the case of the consolidated return regulations, although there are what might be considered to be procedural aspects.

Such questions have been avoided in the Bureau of Internal Revenue by adopting the practice of giving the notice prescribed by Section 4(a) with respect to all regulations, including interpretative and procedural regulations, except where it is found by the Commissioner, with the approval of the Secretary, that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. This practice also avoids the necessity of segregation when a regulation includes rules of more than one type. Moreover, the practice shows a desire to give more than a niggardly compliance with the Administrative Procedure Act when the exigencies of the public business will permit.

With regard to Section 4(b), the practice is to state in the notices issued under Section 4(a) that views may be submitted in writing, but the former practice of permitting oral presentation of views will be continued. The last sentence of Section 4(b) provides for the application of the more formal procedures of Sections 7 and 8 where rules are required by statute to be made on the record after opportunity for an agency hearing. Apparently that provision does not affect the Bureau since rules issued by the Bureau are not required to be made on the record of a hearing. Even where hearings are required under the Federal Alcohol Administration Act, administered by the Alcohol Tax Unit of the Bureau, relative to regulations on

labeling and advertising of certain alcoholic liquors, the regulations are not required to be based on the record of the hearings. (Section 5(f) of the Federal Alcohol Administration Act; 49 Stat. 981 (1935), 27 U. S. C. A. § 205(f)). Of course, the views expressed at the hearing will be considered in the formulation of the regulations, as indeed is the case of all written or oral presentations of views to the Bureau in connection with its regulations.

ADJUDICATION

The great mass of adjudicatory functions of the Bureau of Internal Revenue are not affected by the Administrative Procedure Act. The adjudicatory provisions of the Act are contained in Sections 7 and 8 thereof. However, the application of these provisions depends on Section 5. Unless Section 5 applies, Sections 7 and 8 do not apply. Section 5, by its own terms, applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Thus the application of Section 5 is dependent upon statutory provisions, outside the Administrative Procedure Act, requiring hearings. The tax laws do not generally provide for hearings within the Bureau of Internal Revenue. In practice, however, multitudinous hearings are held within the Bureau. These hearings within the Bureau are commonly called conferences. A large portion of Part 601, included in the September 11, 1946 statement, already referred to, is devoted to description of the conference procedures of the Bureau. See Section 601.1(d)(4). See also the last paragraph of Section 601.2(c)(1), wherein the procedure for adjustment of income tax liability in the agent's office is described. The Bureau has established what is as nearly as practicable an independent organization known as the Technical Staff for the settlement of tax cases out of court. However, the jurisdiction within the Bureau of the Technical Staff corresponds to that of the Tax Court outside the Bureau, in other words is confined to income, profits,

estate and gift taxes. The Staff has established a non-statutory procedure for the hearing of cases which is set forth in Section 601.3 of Part 601. Another semi-independent organization, known as the Excess Profits Tax Council, has been established in the Bureau to deal with claims for excess profits tax relief under Section 722 of the Internal Revenue Code. However, the proceedings before the Technical Staff and the Excess Profits Tax Council are only a small part of the total number of hearings or conferences, usually of an informal character, held either in the central office in Washington or in the numerous field offices.

Except for these non-statutory hearing or conference procedures within the Bureau, the Tax Court and other federal courts would be swamped by the number of tax cases that would be presented to them. The enormous number of cases handled by the Bureau could not be handled under the formalities prescribed by the Administrative Procedure Act.

The adjudicatory functions of the Bureau subject to Sections 5, 7 and 8 are those relating to the liquor traffic. Laws administered by the Bureau of Internal Revenue requiring adjudicatory hearings include the Federal Alcohol Administration Act, 49 Stat. 977 (1935), 27 U. S. C. A. ch. 8. This Act provides for the issuance of permits to certain persons engaged in the liquor traffic. It also provides for the denial, suspension, revocation, and annulment of such permits subject to administrative hearing and court appeal. The administrative hearings are subject to Sections 5, 7 and 8. They are also subject to the provisions of Section 9(b).

Another adjudicatory function of the Bureau affected by Sections 5, 7, 8 and 9(b) of the Administrative Procedure Act is the revocation of permits issued under Section 3114 of the Internal Revenue Code. Section 3114(a) provides, *inter alia*:

No one shall manufacture alcohol, procure it tax-free, denature it, deal in or use specially denatured alcohol, recover completely or specially denatured alcohol, or transport special denatured or tax-free alcohol, without first obtaining a permit from the Commissioner so to do.

Section 3114(b) provides for revocation of such a permit after hearing and for court review of the revocation. Accordingly, the hearing provisions of the Administrative Procedure Act apply. An application for an original permit may be denied without a hearing and thus is not subject to the hearing provisions of the Administrative Procedure Act.

The hearings pursuant to the Federal Alcohol Administration Act and Section 3114 of the Internal Revenue Code are subject to the provisions of Section 5(c) of the Administrative Procedure Act relating to separation of functions. Heretofore no separate force of examiners has been maintained. Section 11 applies to the appointment of examiners.

JUDICIAL REVIEW

With regard to the regulatory functions as to the liquor traffic just discussed, the agency actions are subject to judicial review under statutes in existence before the enactment of the Administrative Procedure Act. Section 3114 of the Internal Revenue Code, which establishes a permit system for certain purposes, also provides, in case of a refusal of a permit or revocation of a permit, for review by a "court of equity," which may affirm, modify or reverse the finding of the Commissioner. Such review seems adequate, and it is unlikely that it is changed by the Administrative Procedure Act. Senator McCarran, in his presentation of the bill to the Senate, said, "We did not wish to disrupt or change anything that was statutory." 92 Cong. Rec. at 2152 (Mar. 12, 1946). However, it is arguable that the scope of review is extended slightly by the provisions of Section 10(e) of the Administrative Pro-

cedure Act. Similar considerations apply to the judicial review provisions of the Federal Alcohol Administration Act, 49 Stat. 977 (1935), 27 U. S. C. A. ch. 8.

Turning now to other Bureau of Internal Revenue functions, which, as has been stated, are not generally regulatory in character, there are long-established statutory methods of judicial review. A suit for refund is an available remedy, and, in the case of income, estate, and gift taxes there is the alternative remedy through the Tax Court of the United States. Under either alternative there are provisions for appellate review in the Circuit Courts of Appeal and the Supreme Court. The same things are true as to excess profits taxes except for special provisions under which administrative action pursuant to certain relief provisions are reviewable only in the Tax Court without any right of appeal. Section 732(c) of the Internal Revenue Code. There are other express limitations imposed by the Internal Revenue statutes upon judicial action, such as Section 3653(a) of the Internal Revenue Code, which provides that, except as to action contrary to the Tax Court procedure, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Such a provision seems quite clearly to come within the introductory exception in Section 10 of the Act as to "statutes [which] preclude judicial review."

Before leaving this matter of judicial review of administrative decisions, I cannot resist the temptation to mention one of my favorite subjects, the administrative review of judicial decisions. See Dwan, "Administrative Review of Judicial Decisions: Treasury Practice" (1946) 46 Col. L. Rev. 581. Limiting myself for the present to a few aspects of that subject, there is, first, the practice of long standing under which the Commissioner announces in the Internal Revenue Bulletins that he "acquiesces" in certain listed decisions of the Tax Court of the United States, formerly the Board of Tax Appeals, and that he does not acquiesce in certain other listed decisions. In other words,

the Commissioner gives public notice that he will or will not follow certain decisions as precedents. This practice is apparently outside the scope of the Administrative Procedure Act. Another administrative expedient of more recent and less frequent use is the limitation of the retroactive application of judicial decisions to other cases. An illustration may be taken from the Treasury action shortly after the Supreme Court's decision in *Helvering v. Hallock*, 309 U. S. 106, 60 Sup. Ct. 444, 84 L. ed. 604 (1940). In that case the Supreme Court held that the retention by the settlors of trusts of certain reversionary interests made the trust properly subject to estate tax; in doing so, the Court overruled its own decisions in two cases decided in 1935. The Court pointed out that the settlors died before the 1935 decisions. That fact eliminated any question of reliance on those decisions, but the Treasury had to consider other trusts. A Treasury decision was issued amending the regulations to conform them to the *Hallock* decision but exempting property transferred while the 1935 Supreme Court cases controlled from inclusion in gross estate, provided a gift tax had been paid. Thus the Treasury sometimes can "do equity" where the courts are not in a position to do so. In conclusion, then, it is appropriate to refer to the wise statement of the late Chief Justice Stone in his dissenting opinion in *United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. ed. 477 (1936), at 87:

Courts are not only the agency of the government that must be assumed to have capacity to govern.

DISCUSSION PERIOD

FEBRUARY 3, 1947

The Session Convened at 8:00 p.m.

QUESTION: Is the Tax Court an agency of the government?

MR. DWAN: That is a very interesting question. I had thought of discussing that, but on further consideration I concluded that it was more the business of the Tax Court and the Department of Justice than of the Bureau of Internal Revenue.

However, I did notice in the services the other day that the Tax Court has passed on a motion which in effect rules that it is not an agency within the meaning of the Act. Of course, that, I assume, is subject to appeal.

QUESTION: How does the Commissioner justify his power to fail to acquiesce in court decisions when all other agencies and the litigants and people generally are required to give weight, either on the theory of *stare decisis* or the theory of *res judicata* to decisions?

MR. DWAN: In the first place the Commissioner does not undertake not to follow the decision in a particular case. In other words, he follows the judgment of the court so there is no question of *res judicata*. As far as *stare decisis* is concerned, it must be regarded, I think, as a limitation of *stare decisis* in the sense of always following what the courts do. But I point out that this practice, which I mentioned, has been going on now for over twenty years. And I think people want to know what the Bureau's attitude is. Furthermore, I think it should not be assumed that the courts are the only ones that have good lawyers; in other words, courts can make mistakes as well as other people. Therefore, it is the Commissioner's privilege, to relitigate the question. Of course, if he eventually loses in the Supreme Court or in a number of Circuit Courts, he will give up.

QUESTION: What kind of a ruling was the recent one on the deduction of portal-to-portal pay?

MR. DWAN: I think it was just an ordinary Commissioner's ruling but I am not sure about it.

QUESTION: It does not have any note or anything. It came out as a press release.

MR. DWAN: I assume that it will be in the bulletin eventually as probably an "I. T.," income tax ruling. But it was a matter of such public importance I guess they considered it well to issue it in advance of actual publication in the bulletin.

QUESTION: Do you think it was for the guidance of the public then?

MR. DWAN: Definitely, yes.

QUESTION: Does that put it in the Federal Register, as I understand?

MR. DWAN: That is a good point. I had not thought of it. But I think that it probably should be.

QUESTION: How does the Commissioner, as a matter of practice, look upon requests for rulings in matters which have not yet reached the point of litigation, for the guidance of taxpayers? Does he welcome such requests?

MR. DWAN: I would say the present practice in the Bureau is very liberal in answering inquiries which have a real basis.

QUESTION: Does the Act which we have been discussing in any way affect the scope of appellate review particularly in connection with the question of the Dobson rule?

MR. DWAN: I think that gets back to that question of whether the Tax Court is an agency, do you not think so? I would be glad to have someone else express his views on that.

QUESTION: To what extent will the Administrative Procedure Act limit, or in any way modify, the well-known practice of the Bureau to issue so-called confidential memoranda for the guidance of their own staff?

MR. DWAN: I do not think there is anything in the Act to prohibit that practice. The Act says rules intended for the guidance of the public. Obviously a memo like that is not so intended. But it might have some effect on the practice.

QUESTION: In referring to notice of deficiency, compromise, closing agreements and such things, a while back I believe you stated that they were not subject to Section 3(b) of the Administrative Procedure Act because they could be considered as required for good cause to be held confidential and so forth. Did you have in mind that section of the Internal Revenue Code that restricted publication of information?

MR. DWAN: Yes. Section 55 and like sections.

QUESTION: So that the thing that makes them confidential is that they deal with specific taxpayers and publication would reveal the I. T. of the taxpayer and so forth?

MR. DWAN: That is right. Section 55 is a penal statute.

QUESTION: That is a restriction which you avoid, do you not, when you want to publish such rulings, by using letters and disguising the facts in other respects?

MR. DWAN: That is right.

QUESTION: So what it really comes down to is a desire to avoid the extraordinary time and labor required in disguising the cases so that you can prepare them for publication?

MR. DWAN: That is correct, except those that are considered of general public interest.

QUESTION: Will Section 5(c), the separation of functions, have any effect upon the unit?

MR. DWAN: Only in those liquor cases, I think. I referred to them.

QUESTION: The attitude is that all of the hearings are not subject to the Act and therefore the person may be both the prosecutor and the tryer of the facts?

MR. DWAN: These conferences are so informal that I do not think anyone regards them in those terms. Do you have something specific in mind?

QUESTION: No, nothing specific. I was just wondering how it would affect the conferences and hearings before examiners?

MR. DWAN: We do not have examiners.

QUESTION: I mean special agents who may take testimony under the Act.

MR. DWAN: Those are all very informal. They may or may not make a record of the proceedings.

QUESTION: It is pretty clear, is it not, that the ordinary Bureau conference is not subject to the separation functions requirement in Section 5 because that requirement has reference to cases of adjudication required by statute to be determined on the record after opportunity for hearing? And that just is not so of practically any of the Bureau proceedings?

MR. DWAN: Technically it does not apply. I just thought maybe you were referring to the underlying policy.

QUESTION: Generally the underlying policy. I was wondering if it would have any effect on the policy?

MR. DWAN: As I pointed out before, the business of the Bureau could not be handled on a formal basis like that.

QUESTION: Mr. Dwan, would you mind elucidating, at least for me if not for anyone else, just how this 30-day rule is actually going to work? For example, in the January 28th issue of the Federal Register there was published a so-called regulation or amendment to the trust regula-

tions as a result of the famous Clifford case, decided about seven years ago. Having been published on January 28th, it means that any one who has any comments or suggestions for changes must submit them in writing to the Commissioner on or before February 27th. Does that mean that, at least theoretically, the Commissioner may withhold actual promulgation of those regulations for months and months after considering what might be very vital and cogent objections? Or can he, in the interests of expedition, look the protests and comments over and say, "Well, they may have merit but since it is important to clarify the whole question one way or another, I shall go ahead and issue the regulations with the approval of the Secretary and leave the final adjudication to the courts"? I think that indicates a good example of how the 30-day rule may work. If you do not mind, I would like to have a little discussion on it.

MR. DWAN: Suppose some excellent analysis of the question came in the last day of the 30 days. Obviously you could not consider that adequately within twenty-four hours or anything like that.

QUESTION: Does the 30-day rule mean that all comments, criticism, objections, must be disposed of and everything must be in and that he must have made up his decision within 30 days or shortly thereafter, or cannot he just reconsider? It may take him six months to reconsider.

MR. DWAN: I think as far as the Act is concerned, he could take six months if he wanted to, or six years. But in this particular instance that you mentioned it is very unlikely that he would delay it any longer than he had to.

QUESTION: Cannot he abandon that original proposal and start out with any other one?

MR. DWAN: Surely, he can, technically, so far as the Act is concerned.

QUESTION: Does that mean that if lawyer "A" sends in cogent objection and the revision is made and no one, of course, knows about it except lawyer "A" and the Commissioner, must he republish that again? Does he then put it in the Federal Register again as a tentative regulation?

MR. DWAN: He is not required to do so, so far as I know. There is nothing in the Act to require him to do so.

PROFESSOR WALLACE: I am a little bit lost. Are you speaking of the 30-day rule in 4(c) of the Act?

QUESTIONER: Yes.

PROFESSOR WALLACE: All that requires, as I read it, is that a new rule must be published for 30 days before it becomes effective. Is not that all that says?

QUESTIONER: It says not less than 30 days.

QUESTION: Suppose, Mr. Wallace, you should send in a very good objection and the Commissioner rewrites completely what is now the tentative Clifford amendment. Must he republish those rewritten amendments so that someone else may get a crack in saying that all your suggestions are not any good?

MR. DWAN: I do not think so, because under Section 4(a) he does not have to publish them in the first place. All he has to do is state what the issues are. I should think the first publication would indicate the issues. On the other hand, I suppose he could if he wanted to. I was interested more in the mandatory requirement rather than any courtesy on his part.

PROFESSOR WALLACE: He has to state, under Section 4(a), the terms or substance of the proposed rule. You are relying on the balance of that, is that it? Or a description of the subjects and issues involved?

MR. DWAN: Yes.

PROFESSOR WALLACE: Do you go this far: So long as he makes it clear that the rule has to do with the Clifford doctrine, it does not matter how much he may shift around or elaborate on the Clifford doctrine; if he once publishes it, it can become effective in any old form after 30 days have expired, is that the idea?

MR. DWAN: Yes. He has to give 30 days and then, having considered these things, he publishes his final regulation which becomes effective 30 days thereafter.

QUESTION: I believe the same practice is followed in the Interstate Commerce Commission where a proposed rule is issued and an opportunity given to counsel to discuss it. The Commission studies the objections and briefs and then publishes their own rule. It may be 30 days, it may be longer. The Senate Committee in its reports said that the specification of the 30-day deferred effective date is not to be taken as a maximum, since there may be cases in which good administration, or the convenience and necessity of the person subject to the rule, reasonably require a longer period. But I believe once the rule is promulgated, after considering the objections, it need not be again given the 30-day opportunity for further discussion.

MR. DWAN: That is pretty clear.

QUESTION: An extreme example of that, supposing as a result of the objections, the Commissioner reversed his position entirely. Theoretically he would not have to republish that, is that correct?

MR. DWAN: That is correct.

QUESTION: How did the Commissioner determine that these proposed new Clifford trust regulation rules were not interpretative rules? Why did he give notice at all?

MR. DWAN: As I said, we do not distinguish between them. We give notice in all cases.

QUESTION: Is that because you do not know the difference?

MR. DWAN: You are entirely correct. That is the first reason. We do not know the difference—they overlap so much. In the second place, why not follow out the spirit as well as the letter of the section and give notice on all of them.

QUESTION: Seriously, we attorneys, of course, have just the same difficulty as you have. And when you start out by being very gracious, I would say, to the public at large by publishing, are you not establishing a precedent which may come home some day to roost, very much to your prejudice?

MR. DWAN: Possibly. There is nothing to stop us from reversing our procedure.

QUESTION: You have before.

MR. DWAN: I do not see how anybody could object. Suppose some little interpretative regulation interpreting some word in the statute came out and the Commissioner decided it was not important enough to go through all this rigamarole. I do not see how anybody could justly criticize him.

PROFESSOR WALLACE: You do that not upon the ground that the rule was interpretative but upon the ground that all this procedure business is unnecessary?

MR. DWAN: That is right. On either ground.

PROFESSOR WALLACE: As the statute expressly provides for in 4(a)?

MR. DWAN: That is right.

QUESTION: To get back to what Professor Wallace was asking before about the confidentiality, does Section 3(b) impose any limitation upon the Commissioner's discretion

in determining that a "good cause" should be a confidential one?

MR. DWAN: I suppose he has to act reasonably. But it seems to us that Section 55 of the Internal Revenue Code, which forbids him to give out information like that, is enough of itself.

QUESTION: What is the month in which the article you mentioned is going to be published?

MR. DWAN: It is already published. Last July.

FEDERAL POWER COMMISSION PRACTICE AND
PROCEDURE AS AFFECTED BY THE
ADMINISTRATIVE PROCEDURE
ACT OF 1946

BRADFORD ROSS

Most of tonight's audience, I presume, are familiar with the past years of legislative effort to standardize administrative procedure since Dean Vanderbilt covered that subject last Saturday morning. Hence, I shall do no more than refer briefly to that background. During this period, a number of agencies effected many changes in their procedures to keep apace with the developing precepts of fair and impartial administration. Those changes adopted by various agencies were not uniform. Moreover, some agencies met the needs more effectively than others. The ultimate result of this situation found legislative expression in the Administrative Procedure Act.

I am sure that you are familiar with the general provisions of the Act after Mr. McFarland's analysis last Saturday. And so, my remarks here are limited to a presentation of my own personal views as to the estimated effect of the Administrative Procedure Act on the Federal Power Commission's functions and procedures. As the expression of Congressional will on the subject, the Federal Power Commission is determined to implement its provisions in the utmost good faith. It is in this spirit that we in the Commission approached the problem of conformance. When a reasonable doubt arose as to the meaning of the Act on a certain point, the Commission leaned toward that interpretation complying with the clear spirit of the Act. I believe that if the Commission misinterprets the Congressional mandate, it will be on the side of circumspection, not evasion.

A brief evaluation of what I believe are the outstanding

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results of the Act may aid in understanding why the Federal Power Commission has changed its practices and procedures in certain respects. The statute purports to be neither a specification of the details of administrative procedure, nor a codification of administrative law. I consider it an effort to frame an outline of basic essentials of fairness in the administrative process. The framers, in setting up the postulates of fair procedure, have acknowledged their reliance, to a great degree, upon the better practices of established agencies such as the Interstate Commerce Commission, the Federal Trade Commission, and our own Commission. As a result, I believe the Act will not greatly alter the practices and procedures of some agencies. It will, however, take much of the so-called "mystery" out of certain administrative procedures.

All agencies are handicapped in their efforts to revise rules and procedures by the complete absence of judicial interpretations of the Act. Experience since passage of the Act has induced a change of my view as to certain provisions. Further experience will undoubtedly produce similar changes. I know that others in and outside the federal government share some of my uncertainties. The courts will have to resolve finally some of our problems.

Under the guidance of our present Chairman, Nelson Lee Smith, the Rules Committee of the Staff, composed of the Chief Trial Examiner, the Secretary, and the General Counsel, with assistance from other staff members and from representative practitioners before the Commission, evolved and presented to the Commission a draft of revised rules of practice and procedure. These rules, with some changes, were adopted by the Commission in time for publication on September 11, 1946, the date on which the Act, excepting certain sections, became effective. I might point out here—although the Act did not require that Sections 7 and 8 take effect until December 11, 1946—the Commission made the necessary changes to comply with those sections in time for the September 11th publication. The

revised rules incorporated many changes in addition to those made to comply with the letter and spirit of the Administrative Procedure Act. Such additional changes resulted from a prolonged study of our rules which was nearing completion at the time of passage of the Act.

To acquaint you generally with the functions which Congress has entrusted to the Commission, I shall sketch the background for, and outline summarily, our present jurisdiction.

The Federal Water Power Act (41 Stat. 1007 (1920), 16 U. S. C. A. § 791 *et seq.*) established the Federal Power Commission with authority to license certain water-power projects. The 1920 Act provided for administration by three busy men—the Secretaries of War, Interior, and Agriculture. The Reorganization Act of 1930 provided for the present five-man, bipartisan, independent Commission which was authorized to employ a staff of its own. Congress passed the Federal Power Act (49 Stat. 838 (1935), 16 U. S. C. A. § 791a *et seq.*) as a part of the Public Utilities Act (49 Stat. 803 (1935), 15 U. S. C. A. § 79), authorizing the Commission to regulate, among other things, the interstate transmission or sale of electric energy at wholesale. The Federal Water Power Act of 1920, with changes, was made Part I of the 1935 Federal Power Act. In 1938, the Natural Gas Act (52 Stat. 821 (1938), 15 U. S. C. A. § 717), added jurisdiction to regulate the interstate transportation or sale of natural gas. Our jurisdiction has been further implemented by several other statutes.

Under these Congressional grants of authority, the more important functions of the Federal Power Commission can be summarized as follows:

1. The licensing of water-power projects on waters over which Congress has jurisdiction, or on lands of the United States or at government dams.
2. The regulation of the transmission or sale for resale of electric energy in interstate commerce, regulation of accounts, rates, certain security issues, dispositions of

properties, mergers and consolidations, depreciation practices, interconnection and coordination of facilities of electric public utilities; and also compilation and publication of statistical and other information concerning the electric utility industry.

3. The regulation of the transportation or sale for resale of natural gas in interstate commerce, including the issuance of certificates of public convenience and necessity for the construction and operation of facilities; and the regulation of accounts, rates, and depreciation practices of natural-gas companies; and also compilation and publication of statistical and other information concerning the natural-gas industry.

4. The making of river basin surveys required in connection with the licensing of non-federal hydroelectric projects and as a basis for recommending installation of generating facilities in federally-owned flood control and navigation projects.

5. Certain duties involving approval of rates, accounts, and related matters for federally-owned hydroelectric projects.

As can be seen, the Commission's functions include licensing, rule making, adjudication and investigations. Such diversification within a single agency makes rather complex the task of squaring those functions with the provisions of the Administrative Procedure Act, which is based on a functional classification.

Coming now to a discussion of specific changes in our rules and procedure necessitated by the terms of the Act, not many major changes had to be made, and these are embodied in our rules. Before dealing with the changes in our practice and procedure in detail, a statement of what I consider to be the major changes may be helpful. Our rules now require the trial examiner's report to be part of the record; Staff counsel are now given the power to enter into binding stipulations; the Commission has established a separate opinion-writing section; and the pre-

siding officer in a Commission hearing is now given authority to determine the materiality and relevance of evidence sought by subpoena. The foregoing changes will be further discussed as we proceed with an examination of pertinent provisions of the Act.

Let us look at Section 2 of the Act, which is concerned with definitions. I believe subsection 2(c) is of special interest to our Commission. It defines rule making as "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of the valuations, cost, or accounting, or practices bearing on any of the foregoing." Within the scope of this definition are many of our principal functions including rate making, cost determination, proceedings to determine accounting classifications and dispositions, and approval of mergers—to mention some outstanding ones. In addition, 2(c) would seem to encompass "substantive" rules, since it applies to rules which "implement, interpret, or prescribe law or policy." "Substantive" rules are those by which the Commission prescribes a standard of conduct under a general statutory authority to make rules. Examples are, the uniform systems of accounts under Section 301(a) of the Federal Power Act and under Section 8(a) of the Natural Gas Act.

The definition of rule and rule-making in Section 2 is vital in determining which cases are governed by Section 4 covering the procedures to be observed in rule-making proceedings, and those which are governed by Section 5, covering adjudications. This results from the fact that rule-making is defined with particularity and adjudication is defined to include whatever is embraced in the phrase "other than rule-making." Hence, our discussion of rule-making necessitates an excursion into Sections 4 and 5.

The legislative history of the Act shows conclusively that rule-making was regarded as essentially legislative in nature, that is, it implements law and policy for the future.

In rule-making, an administrative body is not determining behavior, conduct, or liability under a past or existing law; such determinations are adjudications. The Act is based upon a broad and logical division between rule-making and adjudication; i.e., between the legislative and judicial functions.

The Report of the Attorney General's Committee recognized that rule making could be of general or of specific applicability, or even at times could involve the adversarial element. Yet the fundamental nature of rule-making was seen to be the prescription of a rule for the future. In their recommended bill, the majority of the Attorney General's Committee did not define rule-making. They did, however, define adjudication as "... proceedings wherein rights, duties, and other legal relations are required by law to be determined after opportunity for hearing ..."; and specifically excepted rule-making proceedings from the provisions applicable to adjudication.

The minority of the Attorney General's Committee defined adjudications, in their recommended bill, to be:

... the final disposition by any agency of particular cases, complaints, applications, or proceedings ... involving named persons or a named *res*.

and said:

... it [adjudication] may or may not include rate making and price fixing, for these, while in theory rules for general future applications, are adjudicatory in form and in customary procedure; ...

Thus, we see there was a conflict on this point between the majority and minority. The majority saw clearly that procedures for rule-making, which operate in the future, should not be confused with procedures for adjudication. Under the view of the minority, a function which is fundamentally rule-making in nature, being for future application would apparently be classified at times as adjudication.

I believe the legislative history and the specific terms of the Act bear proof of the fact that Congress adopted the view of the majority of the Attorney General's Committee. For example, the House Committee Report states precisely that:

Rule-making, of course, is not subject to any provision of Section 5.

The Act, when it appeared in the Senate Committee Print in 1945, restricted the definition of "rule" to only rule-making of general applicability. As a result of the House Judiciary Committee hearings, when it was explained how administrative rule-making often affected specific persons or companies, Section 2(c) was changed to its present wording. As previously indicated, it now includes rule-making of both particular and general applicability. In explaining this section of the bill, the House Judiciary Committee Report specifically points out that rule-making:

does not preclude agencies from considering, and so far as legally authorized, dealing with past transactions in prescribing rules for the future.

Thus, we see that, in response to criticisms against the limited definition of "rule-making" originally used in the bill, Congress expanded it to include rule-making of particular applicability, and rule-making which involves consideration of past transactions. This approximates the view held by the majority of the Attorney General's Committee.

In contrast to the expanding definition which "rule-making" received, adjudication was materially reduced in scope during the course of its legislative history. In the Senate Committee Print of 1945, as in the enacted bill, adjudication included whatever constitutes "other than rule-making."

Up to this point in our discussion it would seem clear that rule-making functions are completely outside the provisions of Section 5 covering adjudication. Moreover, subsection 5(c) expressly exempts:

. . . proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; . . .

In the original Senate Committee Report, the exemption applied only to agency rulings on the "past reasonableness of rates." These were exempted from 5(c) because they require, as do rule-making functions, the greatest use of the agency's informed opinion. This was understood by the Committee to embrace most reparation cases, such as those before the Interstate Commerce Commission. However, even this exemption was thought to be too restrictive in its nature. It was pointed out how the rate making functions of the Interstate Commerce Commission and Federal Power Commission are often of a consolidated nature. It was further indicated that to prescribe effectively a rate for the future, a finding of the past reasonableness of rates must precede it. If the provisions of 5(c) were applied in such consolidated cases, it was feared that agencies whose principal function was rate making would be denied the most effective use of their expert personnel in technical and complex fields—where agency policy is often established in individual cases. As a result, Congress changed the exemption to its present form.

This was done, as Mr. Walter, Chairman of the Subcommittee of the House Judiciary Committee, explained on the floor of the House, because cases concerning the validity or application of rates, facilities, or practices of public utilities or carriers:

. . . are customarily consolidated with rule-making proceedings where the separation of functions is not required so that, unless excepted from this provision, either rule-making would be restricted beyond the intent of the bill or consolidated proceedings would be impossible.

These consolidated rate making proceedings usually involve a preliminary administrative determination that a past rate is unreasonable. Such a determination, in the

language of the Supreme Court in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 59 Sup. Ct. 754, 88 L. ed. 1147 (1939), "has no immediate legal effect although it may be the basis of a subsequent rate order." It is an administrative determination, as that Court recognized, which "does not determine any right or obligation."

I have endeavored to show from the legislative history of the Act, that Congress recognized that the determination of rights and obligations under past or existing law is not rule-making but adjudication, as is clearly apparent by a statement of Mr. Walter in a discussion of the bill on the floor of the House. He said:

In rule-making an agency is not telling someone what his rights or liabilities are for past conduct or present status under existing law. Instead, in rule-making the agency is prescribing what the future law shall be so far as it is authorized to act.

Such a determination, which is an integral part of a consolidated rule-making proceeding does not fall within the scope of adjudication. It is only a preliminary, interim step in the rule-making proceeding. As such, the Supreme Court has held it is not subject to judicial review. See, *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 619, 64 Sup. Ct. 281, 88 L. ed. 333, (1943). Such determinations clearly fall within the exemption granted by 5(c).

However, in the Committee reports, we find a suggestion which causes some confusion, if taken independently. In dealing with the exemptions under 5(c), it is there suggested that administrative agencies should not apply the exemption to such cases "as tend to be accusatory in form or involve sharply controverted issues." Does this superimpose a qualification upon the plain words of the Act and override the persuasive force of the legislative history? Succinctly, the question is whether an exemption under 5(c) should be applied to consolidated rule-making proceedings—which include a preliminary administrative

finding of an unreasonable rate—if they tend to be accusatory in form or if sharply controverted factual issues are involved.

Following the Committee's suggestion, an agency would effect separation of functions in such cases. I firmly believe such separation was not intended by Congress. The whole history of the Act shows it has undergone compromises resulting from criticisms revealing how the essential rule-making functions of various agencies might be severely impaired if the separation-of-functions principle were applied. I believe administrative officials must rely on the plain meaning of the Act, rather than these contradictory suggestions in the Committee Reports. Such suggestions serve as reminders that fair play in all administrative proceedings is to be desired. However, they should not be operative where their application will lead to mischievous results, as Professor Nathanson points out in "Some Comments on the Administrative Procedure Act," (1946) 41 Ill. L. Rev. 368.

Having examined the scope of the definition of rule-making, let us look at the provisions of Section 4 regarding the procedures applicable to rule-making cases.

Subsection 4(a) requires that general notice of proposed rule-making shall be published in the Federal Register unless all persons subject thereto are named and either personally served or have actual notice in accordance with the law. The concept of adequate notice is very important, since notice is the first formal step in the administrative process.

Under this subsection, the Commission is now required to publish in the Federal Register general notice of proposed "substantive" rules and orders relative to rule-making proceedings, such as approval or prescription for the future of rates, cost determination and mergers, unless the parties subject thereto are personally served. The Act requires that there be incorporated in the general notice given, "either the terms or substance of the proposed rule

or a description of the subject and issues involved." While the Commission has in the past given notice substantially as required by the Administrative Procedure Act, one of our rule revisions was that relative to notice. We now have in Rule 19, one which complies with the statute as to the sufficiency of notice and the necessary specification of issues required, whereas the old rule, merely provided generally that the "notice will state the nature of the matters to be heard. . . ."

Subsection 4(b) requires agencies to afford interested persons an opportunity to participate in the rule-making process. The Commission's policy in providing for participation and intervention by interested parties in proceedings has always been liberal, as noted by the Attorney General's Committee on Administrative Procedure. Rule 8 on Intervention also implements this policy. There is now a separate rule which specifies in detail the requisite service by the Commission. By these rules on notice, service, and rights of interested parties to participate in the rule making functions, I believe the Commission has complied with the basic purpose of Section 4 to guarantee to those concerned an opportunity to participate in the rule-making process.

At this juncture, further perusal of some of our functions which fall in the rule-making category to which Section 4 applies might be of assistance. They would include: Proceedings for the determination of actual legitimate cost and net investment of projects; proceedings to determine reasonableness of rates charged by licensees for electric power; proceedings to compel interconnection of facilities; applications for orders approving disposition, merger, or consolidations of facilities or acquisition of securities; investigations to determine and fix just and reasonable rates; proceedings to determine accounting classifications and dispositions; proceedings to determine and fix natural-gas rates or services; and proceedings for the determination of a service area under Section 7(f) of

the Natural Gas Act. While this list is not all inclusive it should serve to point out the principal rule-making functions of the Commission.

Some doubt could be expressed concerning mergers, on the theory that approval of mergers might be "licensing" rather than "rule-making." However, the legislative history of the Act indicates that approval granted by the Commission in such cases falls within the category of rule-making. In this connection, the definition of rule-making is persuasive since it embraces the approval or prescription for the future of corporate or financial structures or reorganization thereof. Moreover, our jurisdiction over mergers of public utilities is analogous to the approval of corporate reorganizations by the Securities and Exchange Commission. And the legislative history of the Act indicates that the definition of rule-making in 2(c) was purposely broadened to avoid, among other things, subjecting Securities and Exchange Commission's control of corporate reorganizations to the separation-of-functions provisions, among other things. Therefore, I believe mergers are properly subject to rule-making procedures.

We turn now to Section 5 dealing with adjudications. This section introduces one of the most controversial parts in the Act. It should be noted, however, that it applies only in the case of adjudications which are required by statute to be determined on the record after opportunity for hearing. This section does not require agency hearings not otherwise required by statute. But it does require the administrative process to reflect certain of the more strict but well accepted traditions of the judicial process, whenever formal adjudicative hearings are required. The language of the section reading, "required by statute to be determined on the record after opportunity for hearing," leaves it uncertain as to whether such a hearing is limited to those expressly required by our basic statutes, or whether it might also include those impliedly required thereby. For instance, under Section 4(g) of the Federal

Power Act, the Commission may issue such order as it may find appropriate, expedient, and in the public interest, to conserve and utilize the navigation and water-power resources of a region. Such orders have been preceded by a hearing as a matter of practice, although the statute does not expressly require one. Irrespective of whether hearings are required in such cases, I am of the opinion that the Commission will continue to grant them.

In Subsection 5(a), we encounter once more provisions which specify the notice to which persons concerned are entitled. Besides the time, place, and nature of the hearing; the legal authority; and jurisdiction under which it is held, the party shall also be "timely informed of . . . the matters of fact and law asserted." As I believe I remarked earlier, we have embodied the statutory standard as to specifications of issues in our rule on notice for hearings. Our Rule 20 dealing with hearings also provides that, in fixing the time and place of hearing, the Commission is to give "due regard to the convenience and necessity of the parties and their attorneys."

One of the fundamental functions of the Commission which may be affected by the notice requirements of 5(a) and the changes in our rules made thereunder is in the issuance of certificates of convenience and necessity to natural gas companies under Section 7(c) of the Natural Gas Act. The notice which the Commission heretofore gave in these cases was incorporated in an order setting the applications for hearing, "concerning the matters of law and fact asserted in the application." The Administrative Procedure Act requires that the notice specify the issues. It is hoped that, in future orders setting hearings, it may in many cases be possible to define more clearly, and limit, the issues, thereby simplifying the issues drawn and obviating matters that would unnecessarily prolong the hearings. In many cases, it is difficult to state the specific issues in advance since the burden is on the applicant to show that the public interest requires that the applica-

tion be granted. When the applicant has put on his case, it is possible that he might have failed in any of a number of essentials, in which event unpredictable issues would arise.

Subsection 5(b) sets up the procedural requirements which must be observed in proceedings held under Section 5. This subsection evidences Congressional awareness that informal proceedings, preliminary conferences and settlements constitute what has been labeled "the life blood of the administrative process." While agencies must provide opportunities for informal disposition of controversies, Congress has deliberately left to the agencies the precise manner in which such opportunities are to be afforded.

The Federal Power Commission has in the past provided such opportunities and many matters have been settled without the need for a formal hearing. However, to comply more effectively with the statutory provisions, a rule has been adopted providing that such conferences may be held at any time prior to or during hearings. In answer to criticism by the Attorney General's Committee on Administrative Procedure, the Commission has provided in Rule 18 that stipulations made at prehearing conferences shall be binding on the parties and on Staff counsel when received in evidence. Previously, the Staff was not authorized to make binding stipulations. In addition to the stipulations provided for in Rule 18, we provided also in Rule 25 that parties and Staff Counsel may stipulate as to any relevant facts and documents and that such stipulations are to be binding on the Staff when received in evidence.

Subsection 5(c), concerning separation of functions, presents that part of the Act which many contend is most difficult of interpretation, as has been previously indicated. In all probability, only judicial determination of its applicability to certain fact situations will dispel the cloud of uncertainty, and doubts and disagreement as to its meaning. It must be remembered that subsection 5(c) applies

only to adjudicatory proceedings included within the scope of Section 5, i.e., cases of adjudication required by statute to be determined after opportunity for hearing. The subsection endeavors to insure fairness of procedure by forbidding the presiding officer in an adjudicative hearing from consultation with the parties on any fact in issue, unless upon notice and opportunity for all the parties to participate.

Since the Commission has endeavored to assure impartial determinations of factual issues, I would not say that any revolutionary change was necessary in Commission practice in adjudicative proceedings. However, the statutory prohibition was written into the rules. Our rule on presiding officers prevents them from consultation with one of the parties on any fact in issue, unless upon notice and opportunity for participation to the others. Rule 30 on Decisions reiterates this prohibition. Since the subsection prevents the trial examiner from consulting with "any person" or "party" on any fact in issue, it was my first impression that the trial examiner would be prevented from consulting with anybody, even an impartial expert or law clerk attached to the Trial Examiners' Division. A thorough examination of the legislative history has convinced me that the examiner is prevented from consultation on any fact in issue with persons who have an interest in the proceeding, but that he may consult with impartial experts, fellow trial examiners, and law clerks. However, I don't believe such assistance could include advice on the weight to be given evidence.

The subsection provides further that presiding officers shall not be responsible to or subject to the supervision, or direction of a member of the prosecuting or investigating staff. Our presiding officers have always been independent of such staff members and, of course, will remain so.

Another provision prohibits prosecuting or investigating staff members from advising in the decision or agency review if they participated in that or a factually related

case. This provision has been fully implemented in the revised rules. Furthermore, to insure the fulfillment of this objective, the Commission has authorized the creation of an opinion-writing section attached directly to, and under the immediate authority of the Commission itself, rather than in the Bureau of Law. Individuals in this opinion-writing section will not have participated in the prosecution or investigation of a case of adjudication in which they assist in drafting the Commission's opinion. The resulting substantial increase in cost and personnel, will, I believe, be more than offset by the improvement in the administrative process.

As a final precaution in maintaining a separation of functions, the rules require the officer presiding over a hearing to include among the appearances of record legal and technical members of the Commission's Staff assigned to work on the investigation or to assist in the trial of a case.

Exemptions from the separation-of-functions provisions of subsection 5(c) include initial licensing, since Congress considered that function akin to rule-making. This exemption appears to cover many of the Commission's cases in which examiners and opinion writers are not prevented by the Act from conferring with the Commission's technical staff who participated in the prosecution of the proceeding. Among functions which appear to be included in this exemption are: issuance of a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act; licensing of projects under Sections 4(e) and 23 of the Federal Power Act; approval of exportation of electric energy under Section 202(e) of the Federal Power Act; and authorization of exportation and importation of natural gas under Section 3 of the Natural Gas Act.

Since the exemption applies only to "initial licensing," an immediate question arises as to the scope and nature of that function. I am of the opinion that, in view of the purpose of the exemption, the phrase "initial licenses"

must be construed to include licenses sought by a licensee in addition to a first or original license, even though the second license bear some relation to the first. In effect, this construction would give full meaning to the broad definition of license in Section 2(e), which embraces "the whole or part of any agency permit, certificate, approval, registration, charter membership, statutory exemption or other form of permission." In other words, the definition clearly suggests that any agency "approval" or "permission" is a license, regardless of whether it may be in addition to or related to an earlier license. Any other construction would be less logical. For example, it is unreasonable to assume that Congress intended that proceedings for an original certificate of public convenience and necessity to construct an expensive and extensive pipe-line would be exempt from the provisions of 5(c), but that proceedings to obtain approval of added facilities—however minute—for use in connection with the same pipe-line would be subject to its provisions. Moreover, if pipe-line company A was initially licensed to transport gas from Kansas City to Peoria and applied for an extension to Chicago, would proceedings on this second application be treated as adjudication subject to 5(c)? The absurdity of an affirmative answer is clear when you consider that an application by pipe-line company B for a connecting line between the same points would be exempt as initial licensing. Each certificate application must be determined on its own merits, and proof is necessary in each case to show that approval is required by the public convenience and necessity. Therefore, I believe that the Commission should treat each certificate application as an initial license case, even if it involves an addition to an original license. Such cases are exempt from 5(c), in my opinion.

On the other hand, subsection 5(c) would appear applicable to proceedings involving withdrawal, revocation, suspension, and annulment of licenses; likewise, to cases where an agency initiates a proceeding to compel the accep-

tance of a license, and amendments and modifications thereof. Such proceedings are determinative of rights or liabilities for past conduct, or of present status under existing law. The Federal Power Commission may have such licensing cases.

Also exempt from this subsection, as previously indicated in the discussion of rule-making, are proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers. Determinations made by the Commission on complaint, or on its own initiative, of the unreasonableness of existing rates, followed by promulgation of a new rate for the future, furnish common examples of cases intended to be treated as rule-making. I have stated my belief that such cases are proper examples of proceedings not subject to the separation-of-functions requirements of subsection 5(c). You will recall that I reached this conclusion despite the suggestion contained in the Committee Reports—that agencies should not apply the exemption to such cases “as tend to be accusatory in form and involve sharply controverted factual issues.”

In concluding our examination of subsection 5(c), we should observe its relevance to the Commissioners. The subsection provides clearly that it shall not “be applicable in any manner to the agency or any member or members of the body comprising the agency.” Legislative history merely indicates that the exemption was made because of the very nature of administrative organization, where the same authority is responsible for both the investigation-prosecution and hearing-decision functions. It is clear that the exemption would not preclude a Commissioner from exercising supervision over an investigation and subsequently participating in the determination of the resulting agency action.

Before leaving Section 5, I might mention that a rule has been promulgated under subsection 5(d) which authorizes declaratory orders, within the sound discretion

of the agency, to terminate a controversy or remove uncertainty.

Turning from Section 5, let us consider "Ancillary Matters," which are the subject of Section 6. In conformity with this section, Rule 4, concerning appearances and practice before the Commission, allows participants to be represented by an attorney or any other qualified representative. Furthermore, effectuating the broadened rights of participation in Commission proceedings—resulting from this section of the Act—the revised rules provide for intervention by an increased number of participants. It is obvious that such increase may result in prolonged hearings and increased costs. In my opinion, the degree of enlargement required by the Act exceeds the necessities of fairness.

Subsection 6(b) requires also that, "Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof. . . ." The revised rules make provision for this. With regard to subpoenas, another ancillary matter, the presiding officer is given authority to determine the relevancy and materiality of evidence sought thereby, and to issue subpoenas in accordance with his determination. Formerly, only the Commission itself could perform the function of determining the materiality and relevancy of evidence sought by a subpoena.

Section 7 is concerned with, and supplements, provisions dealing with rule-making and adjudicative hearings required by statute. The section does not require hearings in addition to those otherwise provided by our basic statutes.

Subsection 7(a) deals with presiding officers and seeks assurance of their impartiality. A primary purpose of the Act was to guarantee to presiding officers increased authority and independence. Subsection 7(b) outlines the examiner's powers. While previously the Commission gave some measure of authority and independence to its exam-

iners, changes were necessary. A detailed rule implements these subsections. The presiding officer can now determine the materiality and relevancy of evidence sought by subpoena. Stipulations which he admits into evidence are binding on the parties, including Staff counsel. He may withdraw from a proceeding when he deems himself disqualified; or the Commission may withdraw him for good cause found, after hearing, as to whether he is personally biased. He regulates the course of hearings, and where evidence sought is peculiarly within the knowledge or control of another party, he may vary the usual order of presentation.

Turning now to Subsection 7(c), relating to evidence, we find that a proponent of a rule or order shall have the burden of proof "except as statutes otherwise provide." The Act appears to effect no change in the Commission's present procedure along these lines. However, our rule on evidence was modified to correspond in terms with Subsection 7(c).

One of the more fundamental changes in our procedure was necessitated by subsection 7(d) requiring that the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding shall constitute the exclusive record for decision in accordance with Section 8. . . ." As a result, the examiner's report is now made part of the record and becomes available to the parties. Formerly, the report was available only to the Commission, and the matters contained therein and the weight accorded it was not known to the parties. Thus was eliminated, I believe, a criticism of the Commission's practice.

Next, we shall consider Section 8, which resulted in rather drastic changes in the Commission's procedure for making decisions. It deals with decisions in all cases, not exempted from Sections 4 and 5, in which agency action is required after hearing provided by statute. Subsection 8(a) concerns action by subordinates. Under it trial exam-

iners either (1) make the initial decision, or (2) recommend a decision—in which case the Commission makes the initial decision. Other procedures are permissible in cases relating to initial licensing and rule making proceedings.

The Commission by rule provided that trial examiners will, in all cases of adjudication, make the initial decision, unless the Commission has the entire record certified to it for initial decision. In the absence of either an appeal to the Commission, or review by the Commission on its own motion within the time provided by our rules, the initial decision of the examiner, without further proceedings, becomes the decision of the Commission. In event of appeal or review, the Commission makes the final decision. When the Commission makes the initial decision, the trial examiner is required to submit his recommended decision, which, of course, becomes part of the record. In lieu of the foregoing procedures the Commission may, in rule-making proceedings and in the determination of applications for initial licenses and certificates, issue a tentative decision or designate any of its responsible officers to recommend a decision as permitted by the section. Also, the Commission has reserved authority, in rule-making and initial licensing, to dispense with intermediate-decision procedure where timely execution of its functions so requires.

This summation is a condensation of our Rule 30 on Decisions, drafted to implement the statutory mandate. However, realizing that such elongated procedure is not always desired by the parties, we have a rule providing shortened procedures, and allowing parties to waive certain procedural steps.

Subsection 8(b), relating to submittals and decisions, provides for presentation of proposed findings and conclusions, or decisions in all cases subject to Section 8. Moreover, parties may make exceptions to initial or recommended decisions of subordinate officers, or to tentative decisions of the agency. Again, our revised rules conform

to the Act. Findings and conclusions may be offered, and exceptions filed. All decisions shall include a statement (1) of the findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented upon the record, and (2) the appropriate rule, order, sanction, relief or denial thereof. The obvious additions to time and effort required in the administrative process under this subsection are substantial.

Next, Section 9, dealing with sanctions and powers, in general requires that the Commission shall not issue any substantive rule or order without its jurisdiction.

9(b) seeks to insure that licensing proceedings be completed with reasonable dispatch. The term "reasonable dispatch" was substituted for the definite limitation of 60 days in the first draft of the bill. I consider this a Congressional indication that "reasonable dispatch" is not absolute and cannot be described in precise terms. What is reasonable for one agency, or one case, may not be reasonable for another. The time our Commission must spend to consider sufficiently an application for a certificate of public convenience and necessity may be much greater than, for instance, that required to consider seamen's permits.

Furthermore, 9(b) may affect the Commission in its provision that where the licensee has made timely and sufficient application for a renewal or a new license in place of an existing license, the existing license shall not expire until such application shall have been finally determined by the Commission. Therefore, it appears that any authorization by the Commission granting approval or permission which expires by its terms will, nevertheless, continue when the applicant has timely filed an application for renewal.

Judicial review is treated in Section 10. It provides that every agency action made reviewable by existing statute and every final agency action for which there is no ade-

quate remedy in court, shall be subject to judicial review. Section 313 of the Federal Power Act and Section 19 of the Natural Gas Act, which provide for review of a Commission order by a party aggrieved, appear to fulfill requirements as to judicial review. Although it may be argued that the category of those who may seek review is enlarged, it appears likely that the section is merely declaratory of existing law in this regard. The section allows those persons to seek review who have "suffered a legal wrong" or have been "adversely affected or aggrieved" by Commission action; the Federal Power Act and Natural Gas Act require that one must be "aggrieved" to secure review. There may result an increase in attempts to secure review of agency actions.

Subsection 10(d) authorizes the Commission or the reviewing court to maintain the parties in *status quo* by postponement of the effective date of the Commission's orders. Both the Natural Gas Act and the Federal Power Act allow the Commission to stay an order, upon application for rehearing. Reviewing courts are expressly authorized by the Administrative Procedure Act to postpone the effective date of an administrative order, or to order continuation of the status of parties. This would not appear to limit the exclusiveness of remedies under the Federal Power and Natural Gas Acts. I don't believe the Commission's final action could be avoided by suspension of an *interim* action. This conclusion seems to be borne out by the first judicial decision on the point. In *Avon Dairy v. Eisaman*, decided December 20th last, by a Federal District Court, the court held that it can act only in case of final adverse action by the administrative body.

A brief reference to Section 11, concerning appointment and qualification of trial examiners, will suffice. By its terms, the Commission, while retaining the power of appointment, can no longer fix the compensation or control the promotion of examiners. These latter matters will

be controlled by the Civil Service Commission after June 11, 1947.

I shall omit discussion of Section 12, which deals with the construction and effect of the Act, and consider Section 3, which I lifted from its logical sequence and reserved until now—because it is universally applicable to all agencies affected by the Act; and because treatment of Section 3 in its proper order would have entailed considerable overlapping.

Section 3 concerns public information. The Congressional intent was undoubtedly “to take the mystery out of administrative procedure.” The purpose of the section is to assist the public in dealing with administrative agencies by requiring publication of administrative materials in precise and current form.

I have already described how the Commission has revised its rules and, in accordance with 3(a), submitted them for publication last September 11th.

Subsection 3(b) requires an agency to publish or, in accordance with published rule, make available to public inspection final opinions or orders in the adjudication of cases—with certain exceptions—and all rules. The Commission has complied with these directions by providing, in our Rule on Public Information, that copies of all final opinions and orders are to be made available for inspection at the Secretary's office. Notification of the adoption of all final opinions and orders is published in the Federal Register.

In accordance with 3(c), another Rule provides that matters of official record of the Commission be available for inspection at the Secretary's office. These provisions already resulted in increased work and personnel in the Secretary's office.

In conclusion, I think it is apparent that the Act has necessitated many changes—some of them substantial—in the Commission's practice and procedure. The major

changes, from the standpoint of those subject to the Commissioner's jurisdiction, are those taking the "mystery" out of administrative law, such as adoption of the intermediate-decision procedure and publication of the examiner's report. There probably will be more participants in Commission proceedings, and this will tend to lengthen them, as will the new intermediate-decision procedures. Since many of the Commission's important cases are decided after a hearing, there will be a substantial addition of time and work expended in the trial of cases. Notices of hearings will have to be more detailed in some cases. Additional experts will be required to assist the Commission. Provision has been made for an opinion-writing section. The convenience and necessity of the parties must be regarded in fixing the times and places for hearings. This may result in more hearings away from Washington, and require more time and expense on the part of the Commission. The express direction to "proceed with reasonable dispatch to conclude any matter presented" creates an immediate problem regarding disposition of the backlog of matters accumulated during the war years. The lawyers must now interpret the provisions of three statutes rather than two, and already interpretation of the new Act has required considerable time. It is possible that more attempts will be made to review Commission decisions. There are also a number of comparatively minor duties which must now be performed which will add materially to the work of the Commission.

I hope and believe that the benefits from the Act will more than compensate for the additional cost and time which will now be required in deciding cases. However, only the passage of time in which to observe the effect of the Act and apply judicial determinations concerning its provisions will enable a true appraisal and comparison of its value and cost.

Those practitioners before the Commission with whom I have discussed the Act, have expressed approval of its

purpose, but have acknowledged confusion as to some of its provisions. They appear to be satisfied with the rules adopted by the Commission to comply with the Act. I personally believe that the purpose of the Act is good and that administrative agencies will find that they can function efficiently under its provisions. Time and the courts will resolve the confusion.

I appreciate very much the invitation to participate in these proceedings, and your courteous patience and attention.

The discussion on this address was combined with the discussion on Mr. Delany's address and is to be found on p. 207.

THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE POST OFFICE DEPARTMENT

FRANK J. DELANY

The Post Office Department is unique among the Government department and agencies represented at this institute. It is a regular department of the government; at the same time it is probably the biggest business in the world, employing in excess of 400,000 employees in about 50,000 establishments in the field of communication, transportation and banking. The great bulk of activity of the Post Office Department is more analogous to private business than to functions of the ordinary Government department.

We are all familiar to a greater or less degree with the service rendered by the Post Office. Yet the vastness of the postal establishment, and the extent to which it has figured and continues to figure in the development of this nation, will come as a surprise to most people.

The Federal highway system springs in its entirety from the Constitutional grant authorizing Congress to establish post roads. (Article I, Section 8, Clause 7.)

In the early days of the life of this country, primary effort was directed toward cutting paths through the wilderness so that settlers might communicate with one another by postal means. Among those who devoted their personal efforts in this direction were Benjamin Franklin and our first President, George Washington. As time passed the stage coach and pony express were utilized, to be followed by the railroads.

In comparatively recent years the Post Office Department inaugurated air mail by operation of its own fleet of aircraft. When this service was well established, the carriage of the mail was entrusted to private carriers who

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then came into being, and who now constitute our commercial air transport system. Within the past thirty days this section of the country has witnessed the carriage of mail by helicopters. This experiment—which follows similar experiments recently conducted at Los Angeles and Chicago—was conducted by the Post Office Department in order to intensify and diversify the benefits of the air mail system. It is inevitable that passenger carriage by helicopter will follow upon the carriage of mail. Thus, the growth of the transportation system in this country has been inextricably intertwined with the growth of the postal system. That relationship continues to this day.

Unusual powers have been given the Postmaster General in connection with foreign relations. An early Act of Congress authorized the Postmaster General to enter into international treaties with foreign countries “for the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them.” (17 Stat. 287 (1872), 5 U. S. C. A. § 372.) Pursuant to this authority the United States is a party both to the Universal Postal Convention, to which most nations of the world adhere, and in addition, is party to the Convention between the Americas and Spain which establishes even freer channels for the interchange of ideas between Latin-American countries and the United States. The provisions of these treaties are exceedingly complex, but result in the institution of a world state for postal purposes, wherein the citizens may communicate with one another freely and simply at a minimum of expense without regard to political boundaries.

In the banking field, we find the Postal Savings System operated by the Post Office Department—the largest savings bank in the world. It enables persons in the most remote sections of this country to obtain the benefits afforded by a savings institution. Over four million depositors carry accounts aggregating in excess of three billion dollars.

The Money Order and Postal Note Systems likewise make available to people throughout all sections of this nation a convenient and safe method for the transmission of funds and constitute in effect the largest personal checking account system in the world. During the past fiscal year over twenty-seven million postal notes were issued, and the dollar volume of the domestic money order business exceeded four and one-half billion dollars.

The dominant purpose of the Post Office Department is to render service. It is only incidental to that purpose that powers of regulation and adjudication are exercised. These powers include authority to control transportation rates and agencies, and the obligation to purge the mails of matter dangerous to the health, the welfare and morals of the citizens of this country.

It is upon this complex institution that the Administrative Procedure Act has been engrafted. No specific exemption of the Post Office Department is found in the Act. Operations are included or excluded from its coverage dependent upon the particular activity involved falling within or without the various provisions. It is therefore necessary in passing upon the applicability of the Act to the Post Office Department to scrutinize individually the multitudinous operations of the Department in the light of the Act's provisions. To do this in detail would take many days. Here and now I shall necessarily deal in generalities, giving closer attention to questions of more general interest.

SECTION 3—PUBLIC INFORMATION

Long before the Administrative Procedure Act was conceived, the Post Office Department had itself undertaken to meet the object sought to be accomplished by the information provisions of the Act.

For many years there have been published and made available in book form the Postal Laws and Regulations

and the Postal Guide. The Postal Laws and Regulations is a compendium of considerable size of pertinent Constitutional provisions, Acts of Congress and regulations of the Department, arranged and grouped conveniently according to subject matter. This volume is found in every post office in the country, in libraries generally, and is sold to the public by the Superintendent of Documents. The Postal Guide, which is issued biennially, takes the form of two volumes of substantial size containing more detailed information concerning the various post offices, their size, and instructions and data pertaining to the use of the mails generally, both domestic and foreign. Like the Postal Laws and Regulations, the Postal Guide is widely distributed. Subscriptions may be taken to amendments and changes in both of these publications to enable the user to keep them up-to-date between intervals of issue. Supplementary to these publications is the Postal Bulletin, issued twice weekly, containing additional information, and amendments to the Postal Laws and Regulations and Postal Guide.

These volumes were not written for lawyers' use. Accordingly, their contents are not broken down in a technical manner such as is required by Section 3 of the Act. For example, all regulations both of substance and procedure relating to the type and kind of rural route delivery box which may be used for the receipt of mail are included together. Thus, a person wishing to provide a new type of delivery box may find in one and the same place the substantive regulations as to the type of box required and the procedural provisions as to the manner in which its approval may be secured.

As a consequence, it has been necessary to reorganize the material contained in the Post Office publications mentioned according to the divisional requirements of the Administrative Procedure Act and to republish that matter in the Federal Register as the Act requires. That has been done and continues to be done as amendments are required

by changes within the Department and of regulations promulgated by it. As an indication of the constant change within this vast organization under discussion, I might point out that since the original publication as required by Section 3(a) of the Act, in excess of 500 sections of the Code of Federal Regulations either have been or are about to be amended.

The opinions, orders and public records required to be made available to the public by subsections 3(b) and 3(c) are so vast in scope that specific enumeration of them would be an insurmountable task. Accordingly, those subsections have been complied with by regulations following their language. Members of the public may make such requests as they desire; in case of doubt as to their right to receive the requested information, the request will be referred to me and after consultation with the interested bureau or office, appropriate action will be taken.

SECTION 4—RULE MAKING

In addition to the general provisions authorizing the head of the Department to prescribe regulations for the government of his department (1 Stat. 28 (1789), 5 U. S. C. A. § 22), there are scattered throughout the United States Code many and varied Acts of Congress authorizing the Postmaster General to regulate on specific subject matter. These provisions range from minute details concerning the operation of the Department to general authority to issue regulations of great public import. For example, there is specific authority to prescribe the dress to be worn by letter carriers (32 Stat. 1176 (1903), 39 U. S. C. A. § 154); there is also authority to fix the rates for foreign mail (17 Stat. 287 (1872), 5 U. S. C. A. § 372); and to regulate the commercial air carrier system of this country (54 Stat. 863 (1940), 49 U. S. C. A. § 4856).

None of these statutes require a notice or hearing prior to the issuance of regulations. Accordingly, Section 4 alone governs rule-making by the Postmaster General;

Sections 7, 8 and 11 have no application to the Post Office Department.

It has been settled by the courts that the United States has a property right and a proprietary interest in the postal service. *Searight v. Stokes*, 3 Howard 151, 11 L. ed. 537 (1845); *In re Debs*, 158 U. S. 564, 583, 15 Sup. Ct. 900, 39 L. ed. 1092 (1895); *Boeing Air Transport v. Farley*, 75 F. (2d) 765 (U. S. C. A. D. C., 1935); *Electric Bond and Share Company v. Securities and Exchange Commission*, 92 F. (2d) 580 (C. C. A. 2d, 1937); *United States v. Atlantic Coast Line R. Co.*, 215 Fed. 56 (C. C. A. 4th, 1914), and *Union Pac. R. Co. v. United States*, 219 Fed. 427 (C. C. A. 8th, 1915).

In re Debs, *supra*, an injunction was entered against the petitioners enjoining them, *inter alia*, "from in any way or manner interfering with, hindering, obstructing or stopping any mail trains—or any trains carrying the mail." The Supreme Court states:

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. *Searight v. Stokes*, 3 How. 151, 169, arose upon a compact between the United States and the State of Pennsylvania in respect to the Cumberland Road, which provided, among other things, 'that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States'; the question being whether a carriage employed in transporting the mails of the United States was one 'laden with the property of the United States,' and it was held that it was. . . .

In *Electric Bond and Share Co. v. Securities and Exchange Commission*, *supra*, it was stated, in a discussion of the powers of Congress over the mails, that:

The power of Congress over the mails is not limited to the pro-

tection of facilities of the mails. It may be exercised to prevent the use of the mails for purposes which it deems objectionable to sound public policy. This power probably may be regarded as even more comprehensive than that exercised over interstate commerce, for the government's interest in the mails is proprietary as well as regulatory.

Also see the discussion by Robert Cushman, in an article entitled "National Police Power Under the Postal Clause of the Constitution," (1920) 4 Minn. L. R., 402; and an article entitled "Legislation, The Expanding Postal Power," (1938) 38 Col. L. Rev. 474, 478.

So varied in scope and effect are the many regulations issued by the Post Office Department that it is impossible to generalize concerning the extent to which they fall within the exception in Section 4 relating to public property. The matter has been discussed with the Assistant Solicitor General. Out of that discussion has come this conclusion in an opinion expressed to me by the Assistant Solicitor General:

I have noted the judicial decisions cited in your letter and which emphasize the proprietary interest of the Federal government in the postal system. It is well known that the United States owns the post office properties and facilities, and that the postal deficits are met by appropriated funds. I concur in your opinion that rules issued by the Postmaster General to prescribe the rates, zones, weight limits, and similar conditions upon which mail service is rendered to the public, involve only matters relating to public property, and are accordingly exempt from the provisions of Section 4 of the Administrative Procedure Act.

The extent to which this principle is to be applied is determined day by day as individual regulations which are proposed are passed upon. In cases where any doubt exists the procedure specified in Section 4 is followed. The exception in Section 4 relating to foreign affairs functions operates to exclude many regulations relating to the international postal service; however, the officials in charge of that service have, as a matter of custom and practice,

for many years, afforded the public informally the rights of discussion and hearing which that section seeks to provide. Many regulations are also excepted as pertaining to management or personnel.

SECTIONS 5, 7 AND 8—ADJUDICATION

In the course of carrying on its business, the Post Office Department necessarily must make determinations of fact, which affect in varying degrees the rights of individual members of the public. Some of these factual determinations are quite simple in nature, while others are complex. As examples of the simple type are the decisions rendered in connection with the exclusion from the mails of firearms and matter which is defamatory. Normally, a firearm is quite obviously a firearm; and statements which are on the outside wrapper of material submitted for mailing are generally either plainly defamatory or not defamatory.

Complex determinations are made in deciding whether a given individual is using the mails to defraud; and in some instances, in connection with the revocation of the second-class mailing privilege, which grants to the publishers of newspapers and periodicals an exceedingly low postage rate.

In between these two extremes are other determinations of fact of intermediate complexity. Included in this group are the adjudication of tort liability of the Post Office Department; settlement of disputes concerning the ownership of mail; the determination of whether books and pictures are obscene; and the fining of carriers for failure to take proper steps to transport the mail.

Prior to the passage of the Administrative Procedure Act these determinations were made with varying degrees of formality proportionate to the complexity and importance of the issues involved. The simple determinations which I have mentioned were made in the first instance by the local postmasters with the assistance of the Solicitor

in doubtful cases. In certain cases in the intermediate group, the member of the public could, if he chose, go beyond the Postmaster to a departmental official, in most cases, myself. Thus, if mail matter is ruled obscene, the party seeking the use of the mail was informed that he might, if he chose, appear before the Solicitor for a hearing on the question. Because in these cases the specific facts are rarely if ever in dispute, the procedure at such hearings has been quite informal.

The complex determinations were made in a formal judicial proceeding with pleadings and evidence taken under oath, subject to cross-examination before a hearing officer. The procedure was substantially that used in the court room proceeding with which we are all familiar.

Inasmuch as most of these proceedings are not "required by statute to be determined on the record after opportunity for agency hearing," they fall outside the adjudication provisions of the Administrative Procedure Act. Congress has not specifically required a hearing to be held, and therefore Section 5 is inapplicable by its terms.

The informal proceedings are, in general, carried on now in exactly the same manner which was observed prior to the effective date of the Administrative Procedure Act. This is not, however, true of the formal proceedings, even though not governed by the Act.

It has been my view that the hearing provisions of the Administrative Procedure Act constitute more than an Act of Congress; that they embody what are regarded as fundamental rules of fair play in quasi-judicial proceedings. It has, therefore, been my objective to adopt the standards of the Act in formal proceedings even when not so required, to the extent permitted by the legislation under which we operate and the adequacy of our budget.

To that end I have endeavored to sharply distinguish between the prosecuting and the judicial function in the conduct of formal proceedings. The trial examiners have been established as a unit separate and apart from the

prosecution unit. We are endeavoring in hardship cases to hold field hearings; use every effort to secure the attendance of respondent's witnesses, despite our inability to subpoena them; and make available to the respondent a transcript of the record, and accord him a right to brief the issues of law and fact prior to the entry of findings and conclusions. Our rules of procedure governing formal proceedings have been revised and are being currently revised still further to bring the procedure as much in line as possible with that specified in the Act.

Numerically, the most important type of formal adjudication has to do with the determination that respondents are or are not engaged in the use of the mails to defraud. (26 Stat. 446 (1890), 39 U. S. C. A. § 259). Second in numerical importance is the determination of the use of the mails for lottery purposes. (26 Stat. 446 (1890), 39 U. S. C. A. § 259). Perhaps third in this regard are hearings following charges that respondents are engaged in illegal enterprises with the use of fictitious names. (25 Stat. 873 (1889), 39 U. S. C. A. § 255). In all these cases a finding of guilty results in the respondent being deprived of the use of the mails; in none of them is the Act applicable.

I venture the opinion that in all these cases the respondents procedural rights are as secure as they would be were the Administrative Procedure Act applicable. However, I believe that indirectly the Administrative Procedure Act has contributed to the safeguarding of respondents' rights by establishing standards for us which we have endeavored to follow voluntarily.

Two types of hearings come within the express language of the adjudication provisions of the Act. Revocation or suspension of the second-class mailing privilege is required by statute to be made only after "a hearing shall have been granted to the parties interested." (31 Stat. 1107 (1901), 39 U. S. C. A. § 232.) Publishers who believe that they are being unfairly discriminated against in the shipment by freight of matter they mail may petition the

Department for a correction of the inequity; and the publisher is entitled at that time to "a full and fair hearing." (39 Stat. 424 (1916), 39 U. S. C. A. § 576.)

The practical importance of the coverage of these proceedings by the Administrative Procedure Act is minimized by their infrequency. In the 8 months I have been with the Post Office Department there has not been one such contested proceeding and none are, within my knowledge, in contemplation.

The normal course of judicial review of our adjudication is by bill of equity to enjoin enforcement of the order entered. There is, however, in the case of petitions by publishers alleging a discrimination in transport of their periodicals, express provision for appeal to the United States Circuit Court of Appeals for the District of Columbia.

CONCLUSION

The abstract principles of the Administrative Procedure Act to my mind require no justification. Their merit is apparent from a mere statement of those principles.

Those of us who have no responsibility for the practical administration of a government agency are necessarily inclined to overlook very pragmatic problems facing government officers. It is to my mind unfortunate that this Act was adopted at a time when an economy campaign is being vigorously carried on by both the executive and legislative branches of the government. The burden of work imposed on the Post Office Department by this statute has been tremendous. In the long run it may well prove worthwhile despite pains accompanying the process of adjustment to it.

DISCUSSION PERIOD

FEBRUARY 4, 1947

The Session Convened at 3:30 p.m.

QUESTION: Mr. Campbell, I believe you stated that Sections 7, 8, and 11 of the Administrative Procedure Act are not applicable to the Post Office Department and later in your talk you stated that the United States Code requires a hearing in the case of the revocation of second-class privileges. Aren't they contradictory statements and would not that require that Sections 7 and 8 be applicable to a hearing with reference to the revocation of the second-class privilege?

MR. CAMPBELL: When I made that statement I was discussing the rule-making. As Mr. Delany pointed out in his discussion here, there are only two functions relating to adjudication which come under the Administrative Procedure Act. As you know it says, "Where hearings are required by statute." In the case of revocation of second-class mailing privileges such hearings are required by statute. Likewise in the case of the order for the transportation of periodical mail, if the publisher desires to protest that order, he then is entitled by statute to a hearing. Also under that Act, if he is not satisfied with the results of the departmental hearing, he can appeal directly to the courts for the District of Columbia. But when I made the statement to which you first referred, that was with respect to rule-making. None of the seventy or more statutes which deal with functions in the Post Office Department and specifically authorize the Postmaster General to prescribe rules and regulations with respect to regulations, require hearings in the promulgation of such rules. That was the statement I made.

QUESTION: I was going to ask the same question but I would like to ask a question of Mr. Ross, if I may.

I wanted to know whether he thinks that Section 5(c) pertaining to the separation of functions would apply to the renewal of licenses in the Federal Power Commission?

MR. ROSS: I do not see how Section 5(c) would apply to the renewal of licenses. The only licenses we grant that are for specific terms are hydro-electric licenses and they are usually for long terms not exceeding fifty years and the Act provides that at the end of that period the government may recapture the property. We also issue certificates of public convenience and necessity which are not for any particular term. They continue for as long as the company lives up to the certificate provisions.

I did mention that an agency-imposed revocation or modification of a license would be included under 5(c).

QUESTION: The question that I have in mind is this: Mr. Campbell takes the position that Section 5 applies to the Post Office.

MR. CAMPBELL: I did not say Section 5 applies to the Post Office.

QUESTION: I heard you say that Section 4 did not. Now, where the hearing is required under the revocation of second-class mailing provisions, that is the adjudication provision, Section 5 of this Act.

MR. CAMPBELL: Section 4 involves rule-making.

QUESTION: That does not apply. How about Section 5?

MR. CAMPBELL: I did not state that Section 4 did not apply.

QUESTION: I thought I understood you to say 4 and 8 do not apply?

MR. CAMPBELL: No, what we said was this: That the government as such has a proprietary interest in the mails. There is also an exception to the extent that would bring us under the "property" exemption in Section 4. Now, with regard to Section 5, which, as I understand, relates to

adjudication required by statute to be determined on the record. We have two which would come under that section: One, the revocation of second-class mailing privilege under a statutory provision which says that such revocation shall not be made without a hearing; and, Two, orders relating to the transportation of periodic mail. An interpretation of the Attorney General, in a memorandum, held that where the statute requires a hearing, by implication it requires that hearing to be held on the record. So that would bring us within Section 5 on adjudications, involving revocation of second-class mailing privileges, and also with respect to the transportation of periodicals. I think I can give you the citation. The law relative to revocation of second-class mailing privileges is embodied in Section 232 of Title 39 of the United States Code. It provides that in revocation or suspension of the second-class mailing privilege a hearing shall be granted the parties interested.

Now, as regards publishers who believe that they are unfairly discriminated against in shipments by freight or in the matter of mailing, they can petition the Department for a review of the matter and are entitled to a full and fair hearing. That is found in Title 39 of the United States Code, Section 576. So there are two specific types of hearings which do come with Section 5 of the Act so far as the Post Office Department is concerned.

QUESTION: And to that extent the Department comes under Section 7 and Section 8, does it not?

MR. CAMPBELL: That is right.

QUESTION: Mr. Ross, in your talk you stated your opinion on which actions fell under rule-making, which under license and which under adjudication. Has the Federal Power Commission in its rules of practice or in any other published document set forth a statement of procedures designating which of these are rules, which of these are licenses and which are adjudications?

Mr. Ross: No, it has not. Of course, the Administrative Procedure Act says that licenses are to be considered as cases of adjudication. My discussion with regard to whether licensing would follow certain procedures was in connection with the exceptions in 5(c) where initial licenses are exempt from the separation of functions provisions and also in connection with Section 8(a) where initial licensing cases do not have to follow the same intermediate decision procedure provided for in cases of adjudication.

QUESTION: Where an application is to be filed with the Federal Power Commission, how is the specific procedure applicable to that application determined? Is that done by the attorney or is that done by stipulation of the parties at the time of the hearing, or how is that done?

Mr. Ross: We have no rule covering that precisely. The Commission will, of course, decide which cases it believes are cases of adjudication and see that the separation of functions are applied to those cases.

QUESTION: Is there any recourse in the event of disagreement by the party filing the application if he disagrees with the interpretation placed upon the application by the Federal Power Commission?

Mr. Ross: There is no provision for that in our rules. Perhaps I did not make it clear that in my own opinion the Commission is going to apply the intermediate procedures in practically every case. They have reserved for themselves the right, as is allowed by the Act, in rule-making and initial licensing cases to make a decision without the intermediate decision procedures. A case of emergency where the decision is required without delay might be such a case.

QUESTION: What I had in mind was supposing the Commission decided it was a rule-making procedure and that I as an attorney wanted to have an initial report from the

examiner on the ground that I thought it was an adjudication. What would happen in that case?

Mr. Ross: I say that as a matter of practice you are going to have that report anyway, so that the question is not going to arise. If the Commission decided to omit the intermediate decision procedures set out in Section 8 because of an emergency situation, I believe the Act requires that the reasons for such omission be stated.

QUESTION: I would like to ask Mr. Ross about the waiver of the provisions of the Administrative Procedure Act. I understand it is fairly common practice, particularly in a license case, to waive the requirements of the Administrative Procedure Act with regard to intermediate decisions and the separation of functions?

Mr. Ross: In our certificate case procedures under the National Gas Act, we have for the last year had a shortened procedure and many companies have availed themselves of that procedure. Under the Administrative Procedure Act we have extended that to all cases where the parties desire to waive the intermediate procedures if there are no parties protesting. For example, in the case of a security issue, where time is of the essence and they want to place securities on the market without delay, they may waive intermediate decision procedures.

QUESTION: In the absence of such a waiver is it your opinion that there should be a 30-day waiting period prior to the effective date of an order other than a rule-making order?

Mr. Ross: You are referring to cases of adjudication?

QUESTION: Yes.

Mr. Ross: I am not sure. I have not really given that any thought. Usually these orders are immediately effective, and I do not know whether or not a waiting period would be advisable in every case.

QUESTION: I am particularly referring to Section 4 of the Act which provides that any substantive rule shall not be effective for 30 days. My original thought was that it applied only to rule making as distinguished from adjudication. But I notice that both the Federal Power Commission and the Securities and Exchange Commission have adopted rules providing for the waiver of the 30-day effective period in adjudication procedures.

MR. ROSS: I know of no such rule. Is your question whether or not the thirty days applies to cases of adjudication as well as to rule-making?

QUESTION: Yes.

MR. ROSS: I think not. It as a provision of the rule-making section and I believe it applies only to rule-making cases.

APPLICATION OF THE ADMINISTRATIVE PROCEDURE ACT TO THE STATUTES ADMINISTERED BY THE SECURITIES AND EXCHANGE COMMISSION

ROGER S. FOSTER

INTRODUCTORY STATEMENT

The Administrative Procedure Act¹ is applicable to functions of the Commission under six different statutes, namely, the Securities Act of 1933 (48 Stat. 74, 15 U. S. C. A. § 77a-77aa), the Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. A. §§ 77-78), the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. A. § 79), the Trust Indenture Act of 1939 (53 Stat. 1149, 15 U. S. C. A. § 77aaaa-77bbbb), the Investment Company Act of 1940 (54 Stat. 789, 11 U. S. C. A. §§ 72, 107; 15 U. S. C. A. § 80a), and the Investment Advisers Act of 1940 (54 Stat. 847, 15 U. S. C. A. § 80b). Only the Commission's advisory functions under Chapter X of the Bankruptcy are untouched.²

While the statutes administered by the Commission all deal primarily with financial affairs, they differ widely both in substantive scope and in their procedural pattern.

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While attempting to reflect a personal understanding of Commission practices and policies, this paper is, of course, not an official statement on behalf of the Commission.

¹ Reference herein to the "Act" means the Administrative Procedure Act, rather than one of the statutes administered by the Securities and Exchange Commission.

² It has been suggested that these functions fall within the express exemption under clause (5) of the introductory portion of § 5 of the Administrative Procedure Act, "cases in which an agency is acting as an agent for a court." It is questionable, however, whether the Commission in the discharge of its functions can be characterized as an agent for a court, since it participates in the proceeding as an independent agency of the Government, although in a purely advisory capacity. However, its advisory functions would seem to fall wholly outside the scope of the Administrative Procedure Act, constituting neither rule making, adjudication, nor such a "disposition" of a matter as would constitute an order. The Commission merely functions as a party to the judicial proceeding and conducts no separate administrative proceedings.

This variety of regulatory contexts makes it difficult to discuss in brief compass the impact of the Administrative Procedure Act on the Securities and Exchange Commission. For that reason I shall deal primarily with those provisions of the Commission's statutes which provide for disposition of matters by orders based upon records at formal hearings and with related informal procedures designed to simplify or avoid the necessity for such hearings. As a preliminary matter I should like to refer briefly to some of the other topics on the suggested outline for these discussions: Public information—adoption of rules of general applicability—and judicial review.

IMPACT UPON COMMISSION PROCEDURES OTHER THAN ITS DECISIONAL PROCESS

Public Information.—According greater public disclosures in the security field is an important part of the public policy of the statutes administered by the Commission, and the Commission has always regarded dissemination of information as to its practices and requirements as an important auxiliary to effective administration. Compliance with Section 3 has therefore involved largely a problem of editorial revision for current publication in the Federal Register of information theretofore made public by the Commission.³ For this reason specialists in Commission affairs are probably not greatly benefited by having such material available in a comprehensive form in the Federal Register, but the compilation in the Federal Register might prove helpful to the general practitioner who has only occasional contact with the Commission.

³ The Commission material published in the Federal Register since the effective date of the Administrative Procedure Act has included past opinions of its chief accountant, counsel or division directors which had theretofore been published for the guidance of the public. The Commission did not construe § 3 as requiring republication of these interpretative materials but thought that this might be of assistance to the public. This republication was made with the *caveat* that the opinions in question should be read in the context of their original publication, and subject to modification by subsequent changes in the statutes, rules or published opinions authorized by the Commission.

Promulgation of Rules of General Applicability.—The Commission is authorized by express provisions in its statutes to adopt “Rules and Regulations” covering a variety of subject matters. Subject to reasonable classification, such a rule is of general rather than particular applicability. It is to be distinguished from an “order” which term as used in the statutes we administer refers to a determination of particular applicability and, except for certain orders of an interlocutory character, or granting relief, is required by the statutes to be entered upon a record and after opportunity for hearing.⁴ The rules here referred to clearly are not adjudication within the meaning of the Administrative Procedure Act and since there is no statutory requirement with respect to hearing or record are not subject to the requirements of Sections 7 and 8 of the Act. (See Section 4(b) of the Act.)

The requirements of subsections 4(a), (b), and (d) with respect to notice of proposed rule-making and public participation in the rule-making process introduce no important innovations so far as the Commission is concerned. It has always been the Commission’s practice to invite industry comment in connection with the adoption of proposed “rules and regulations,” and occasionally to hold public conferences in connection with the process. The Commission also gave consideration to “petitions” as well as informal requests for the issuance, amendment or repeal of rules. Prior to the Administrative Procedure Act notice of proposed rule-making was given by releases made available to the press and mailed to persons thought likely to be interested. Such notice was not required by the statutes administered by the Commission and was of an informal character. Section 4(a) of the Administrative Procedure Act, of course, imposes certain new formal

⁴ The statutes administered by the Commission use the phrase “Rule or regulation” in contrast to the term order without indication of distinction between a “rule” and a “regulation.” The Commission has sometimes designated a group of related rules as a “regulation” but in other respects has used the terms “rule” and “regulation” as interchangeable.

requirements including publication in the Federal Register.

The Commission also made it a practice to articulate the basis and purpose of its rules in published statements accompanying the publication of the rules and in its Annual Reports to the Congress, but except for a brief enactment clause which merely recited that the Commission was acting pursuant to particular statutory provisions and deemed enactment of the rule in question necessary and appropriate under the provisions referred to, no statement of "basis or purpose" was incorporated into the rules themselves. Here again the Administrative Procedure Act imposes a new formal requirement.

Section 4(c) imposes a new requirement that the required publication or service of certain substantive rules shall precede their effective date by at least 30 days, unless otherwise determined for "good cause" found and published with the rule. The only difficulty imposed by this requirement is that of opening upon a possible field for controversy as to the kinds of rules to which the requirement may be applicable or the sufficiency of the good cause shown in the exceptional cases where an early effective date may be deemed desirable by the Commission.⁵ Prior to the Act the Commission had always recognized the desirability of giving the industry time to adjust itself to new rules.⁶

Judicial Review.—The statutes administered by the Commission provide for judicial review in the circuit courts of appeals of all "orders" of the Commission. No express provision is made for review of "rules and regulations" but of course the validity of any rule would be

⁵ Challenge to the "good cause" would, of course, raise the question as to whether the matter were not within the discretion of the Commission and would seem to be limited to cases where the controversy involved the effectiveness of the rule during the 30 days subsequent to publication.

⁶ See, for example, the discussion in the Seventh Annual Report of the Commission, pp. 119-121. See Securities Exchange Act Release No. 3908 amending, subsequent to the Administrative Procedure Act, instructions to a Form 10-K for annual reports. The amendments were made effective approximately two months after publication but effective immediately on a permissive basis.

an issue in any civil or criminal action based upon a charge of violation of the rule. Thus far there has been no occasion to consider whether the scope of judicial review of Commission action has been in any way enlarged by the Administrative Procedure Act.⁷

IMPACT UPON THE COMMISSION'S DECISIONAL
PROCESS—ADJUDICATION, RULE-MAKING OF
PARTICULAR APPLICATION AND RELATED
INFORMAL PROCEDURES

General Analysis.—The decisional process of the Commission dealt with under this heading includes what the Administrative Procedure Act describes as “adjudication”—and also that part of the “rule-making” process which leads to the adoption of rules of particular rather than general applicability. The distinguishing mark of these procedures under the Commission’s statutes is either that they involve the entry of what is described therein as “an order”—or certain legal consequences attach to the Commission’s omission to enter an order. Except for certain interlocutory orders and orders granting relief, the Commission’s statutes normally provide for the entry of such orders on the basis of a record after opportunity for hearing. Thus, even where the procedure is not “Adjudication” but “Rule-Making,” it is under Section 4(b) of the

⁷ Most of the statutes administered by the Commission permit judicial review of an order by any “person or party aggrieved.” The Securities Exchange Act, 44 Stat. 881 (1934), 15 U. S. C. A. § 78(a), accords such review only to a party aggrieved; however, under the Commission’s revised Rules of Practice, it is expressly stated that any person who would be “aggrieved” by the Commission’s order is permitted to intervene and become a party. See Rule XVII, paragraph (d). Since such intervention would be necessary to exhaust the administrative remedy, the consequence is to make the possibility of obtaining judicial review under the Commission’s statutes as broad as the declaration of “right of review” in § 10(a) of the Administrative Procedure Act. In any event it would seem that the effect of § 10(a) of the Administrative Procedure Act is at most to enlarge the class of persons who may resort to the specific procedures for judicial review in appropriate circuit courts of appeals which are accorded by the Commission’s statutes, and not to make applicable the provisions of § 10(b) with respect to possible review “in any court of competent jurisdiction” in the absence or inadequacy of a statutory provision for judicial review.

Administrative Procedure Act made subject to Sections 7 and 8 of the act with respect to "hearings" and "decisions."

To this Decisional Process there may be applicable such important procedural requirements and objectives of the Administrative Procedure Act as (1) affording opportunities for informal or consent disposition (Sections 5(b)(1) and 9(b)); (2) making the administrative process expeditious;⁸ (3) precise delineation of disputed issues of law and fact;⁹ (4) having the person who has presided at the reception of the disputed evidence make a decision or recommendation thereon (Section 8(a)); and (5) preserving separation of functions (Section 5(c)).

The draftsmen of the Administrative Procedure Act were, of course, aware that some of the objectives of the Act are inherently conflicting so that there are problems of choice of emphasis which may differ with the particular type of administrative proceeding and with particular cases. For example, the objective of according expeditious relief to the parties to administrative proceedings may be impaired by resort to particular procedural safeguards. Accordingly, answer to the question of whether, despite the delay necessarily involved, it may be in the interest of the parties to observe particular safeguards may differ with the nature of the proceeding.

The necessity of permitting sufficient flexibility in procedures to permit a choice of emphasis between conflicting procedural objectives was, of course, a major theme of those who criticized the earlier Administrative Procedure

⁸ Thus every agency is directed in § 6(a) to proceed "with reasonable dispatch" to conclude any matter presented, and this directive is repeated in 9(b) with specific reference to the granting of licenses, while the time factor is recognized in §§ 5(b) and the last sentence of 8(a) as bearing on the practicality of certain procedures which the agency would otherwise accord.

⁹ This appears to be an objective of the notice requirements of § 5(a); of the provisions of § 8(b) with respect to submission of proposed findings and supporting reasons; the provisions of § 8(a) with respect to initial decisions of the examiners subject to agency review, recommended decisions of the examiner or responsible officer and tentative decisions of the agency.

Bills. These criticisms found recognition in successive revisions which evidenced a marked trend in the direction of greater flexibility.

The approval of the bill in substantially its present form by the Attorney General was accompanied by an expression of his opinion that a workable compromise had been achieved between the objective of codifying minimum standards of administrative procedure and affording sufficient flexibility to permit in varying types of proceedings a fair adjustment between the conflicting public and private interests affected.¹⁰ Similar points of view have been expressed by Congressional leaders. For example, the Chairman of the Senate Committee of the Judiciary has stated that "the statute need not be viewed as a straight-jacket for administrative agencies. Except so far as there may be other or 'outside' requirements of law, it simplifies as well as directs administrative processes." See the article by The Honorable Pat McCarran, (1946) 32 A. B. A. Jour. 893.¹¹

Another aspect of this problem of flexibility and choice of emphasis is that the Administrative Procedure Act was intended as a formulation of minimum standards for administrative procedure and that the sponsors of the Act hoped that in many instances the agencies would find it possible to go beyond the requirements of the Act.¹²

The Administrative Procedure Act attempted to achieve flexibility in part by classifying procedures in accordance with such categories as "Rule-Making," or "Adjudication,"

¹⁰ Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945) p. 38.

¹¹ The Commission's own final comment on S. 7 recognized the vast improvement of the final bill over its predecessors but expressed the doubt whether, as applied to the Commission's own statutes and procedures, the bill was likely to offer sufficient procedural improvements to compensate for the risk of uncertainty and litigation inherent in the mere application of new terminology to existing procedures. See letter of then-Chairman Purcell dated May 13, 1946, to the Chairmen of the House and Senate Committees, referred to at 92 Cong. Rec. 5129 (May 15, 1946) and quoted in Nathanson, "Some Comments on the Administrative Procedure Act" (1946) 41 Ill. L. Rev. 368, at 419.

¹² See Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945) p. 7.

and "licensing." Certain types of procedures otherwise mandatory are not required in connection with rule-making and determinations of applications for initial licenses. For some agencies it may be feasible to begin consideration of the Administrative Procedure Act by trying to classify the agencies' statutory procedures in terms of these basic definitions. In the case of the Securities Exchange Commission the statutory procedures are so numerous and varied and raise such problems of classification that it has seemed more conducive to achieving the objectives of the Administrative Procedure Act to follow what for want of a better word might be called a more "functional" approach. This approach involves seeking so far as possible to avoid controversies as to how particular procedures should be labeled under the terminology of the Act, and focusing attention initially on what procedural steps the parties consider appropriate. This is, it should be noted, advantageous from the point of view of both public and private interests affected. Thus, while it may mean dispensing with certain procedures neither required nor relevant in the particular case, it also means affording private parties procedural safeguards and assistance beyond the requirements of the Act where they are actually relevant and feasible.

For example, Commission counsel and counsel for private parties to the proceeding can frequently agree as to whether or not there should be a recommended decision and if so, whether it should be by the examiner or by some other responsible officer of the Commission, whether the interested division of the Commission's staff may assist in the preparation of the Commission's decision and whether it is appropriate that there be a 30-day waiting period between the announcement of the Commission's decision and the date when it is to become effective. Only where there is disagreement on such matters is it necessary to consider what the Act requires. Even in that event interpretation of what the Act may require is only a part of the problem. Thus, in an instance where the Commission may resolve a dispute as

to whether a particular procedure is to be observed, in favor of a private party, the decision may rest on the Commission's view that it is fair and reasonable to do so whether or not it may be mandatory to do so under the Act. Moreover, where the decision is against the private party and does necessarily involve an interpretation of the requirements of the Act, there might well be a number of alternative grounds for the decision and it may not appear necessary to make a definitive choice as to the proper label for the procedure in question. For example, denial of a demand for an intermediate decision by the hearing officer may rest on a determination that the particular procedure is either "rule-making" or that it evolves "determining applications for initial licenses" or possibly that the person insisting upon the procedure does not have the full rights of a party and that in view of the contrary wishes of the actual parties to the proceeding the procedure should not be accorded. This, of course, assumes a policy decision that under the circumstances of the particular case the time consumed in having an intermediate decision outweighs its possible assistance in the fair and timely discharge of the Commission's statutory duties.

The Commission's revision of its rules of practice since the effective date of the Act has attempted to afford the maximum opportunity to the parties to its proceedings to agree upon the appropriate procedures for the individual case and to postpone until some difference of opinion may arise any determination of whether in the absence of agreement either the letter or spirit of the Administrative Procedure Act may require the following of a particular procedural routine in connection with any particular statutory procedure. To that end the rules of practice have refrained from labeling prescribed statutory procedures in terms of the typical categories set forth in the Administrative Procedure Act. Instead Rule III(e) makes it the duty of the parties to specify as early as possible in the proceeding what procedures they deem to be necessary or

appropriate and makes it the duty of the examiner to see that a clear understanding is reached at an early date as to the procedure which the parties may desire.¹³

It may occur to some of you that it is futile to expect agreement upon whether to dispense with procedures which have seemed of such fundamental importance as to warrant their inclusion in what has been termed an Administrative Bill of Rights. There is, of course, the habit of lawyers to demand every possible procedural right on the chance that if granted it may prove helpful, and if denied it may afford an additional ground of appeal in the event of an adverse decision. Happily, the Commission is not frequently confronted with this professional approach. The vast majority of procedures before the Commission are instituted upon the application of private parties who are interested in working out solutions at the administrative level and doing so as promptly as possible—and not in laying the foundation for a lawsuit. Typically they evidence less concern in obtain-

¹³ Rule III(e) of the Commission's Rules of Practice provides:

"(e) In any proceeding the moving party shall, in the moving papers or the notice of hearing if that is practicable or, if not, as early as practicable in the course of the hearing, specify the procedures considered necessary or appropriate in the proceeding, with particular reference to (1) whether there should be a recommended decision by a hearing officer, (2) whether there should be a recommended decision by any other responsible officer of the Commission, (3) whether the interested Division of the Commission's staff may assist in the preparation of the Commission's decision, and (4) whether there should be a 30-day waiting period between the issuance of the Commission's order and the date it is to become effective. Any other party may object promptly, or within such time as shall be designated by the hearing officer having due regard to the circumstances of the case, to the procedure so specified and may specify such additional procedure as he considers necessary or appropriate and, in the absence of such objection or specification of additional procedure, may be deemed to have waived objection to the specified procedure and to the omission of any procedure not specified (unless the Commission, for good cause shown, taking into account any resulting prejudice to other parties, determines the contrary).

"The hearing officer on his own motion may, or at the request of any party shall, call a conference of the parties at the opening of the hearing or at any subsequent time for the purpose of specifying and agreeing on the procedural steps to be followed or omitted in the proceeding. Any proposal agreed upon by all the parties shall be read into the record and shall determine the procedure in that respect, except that the Commission may, for good cause shown, taking into account any resulting prejudice to the parties, vary such procedure at the request of any party or, after notice, on its own motion."

ing procedural "due process," and more in avoiding an "undue" amount of procedure which may slow up obtaining a decision of the Commission.

Rule III(e) of the Commission's Rules of Practice is designed to facilitate the avoidance of process that may seem undue in the particular case. It also serves to flush at an early stage of the proceeding insistence, for possibly dilatory purposes, upon time-consuming process. It should be noted that procedures which may be accorded without prejudice to other parties when seasonably demanded might prove highly prejudicial if accorded upon demand made at the eleventh hour. For that reason even in cases where it is decided that the party making timely demand for a particular procedure should have it, either as a matter of right or as a matter of discretion, the fact of such insistence may be relevant in determining such discretionary matters as the time for fixing a hearing, whether to grant requested continuances, how long to allow for filing briefs and similar matters. Where the parties have agreed to omit a particular procedural safeguard the rules allow for possible Commission action authorizing one of the parties to escape from his stipulation if other parties are not prejudiced.

For further illustration of this approach to the Administrative Procedure Act reference is made to some typical procedures under the different statutes administered by the Commission.

The Securities Act of 1933.—

The primary objective of the Securities Act of 1933 is to protect investors by requiring full and fair disclosure of material facts concerning securities publicly offered for sale in interstate commerce or by use of the mails and by preventing misrepresentation and fraud in the sale of securities. Under it, the Commission does not pass on the merits of securities. One can offer any security for sale if it is effectively registered and all the truth is told about it. While the necessity of disclosing the truth concerning prospective security offerings may and should affect both the

determination to make the offering and the reception accorded it, the decision whether to take the risk rests with the investor and is not made for him by the Commission. Accordingly the Commission does not direct or control the flow of capital.

The above summary is quoted from the Commission's Tenth Annual Report (page 2). As for the procedures prescribed in the Securities Act, those most relevant to the present discussion relate to "registration," the process by which a registrant obtains an effective registration statement—and the process by which the Commission may prevent or suspend effectiveness of a registration statement. Assuming no applicable exemption,¹⁴ Section 5(a) of the Securities Act makes it unlawful to use the mails or instrumentalities of interstate commerce in connection with the offer or sale of a security unless a registration statement is in effect.¹⁵ That provision, implemented by civil and criminal sanctions, supplies the impelling force for registration.

The process of obtaining an effective registration statement involves: (1) filing a statement upon a prescribed form and making in the statement the disclosures required by the Act itself and by the Commission's regulations; (2) amending the statement to correct inadequacies or to supply information reflecting later developments, including typically disclosure of the results of last minute negotiations with underwriters as to offering price and spread; (3) lapse of a 20-day period prescribed in Section 8(a) between filing of statement or amendment and its effective date,

¹⁴ Exemptions with respect to certain classes of securities and transactions are accorded by the statute itself, or pursuant to Commission rules and regulations authorized by the statute. The Securities Act does not provide for exemptions by order nor for hearings in connection with the promulgation of rules. An important part of the informal interpretative assistance given by the Commission's staff relates to the availability of exemptions covering particular types of securities and transactions.

¹⁵ Section 5(b) of the Securities Act imposes requirements with respect to submitting an adequate "prospectus" to the prospective purchaser. The qualification of the prospectus is, generally speaking, part of the registration process and to simplify discussion references in the text are limited to the administrative procedures related to registration.

or an order of the Commission accelerating the effective date.

A deficient registration statement, which does not meet the statutory requirements, may nevertheless become effective and continue in effect unless the Commission as a result of formal proceedings orders otherwise, or unless, as a result of informal procedures, the statement is corrected by amendment, or is withdrawn. Action taken to deny or terminate effectiveness of the statement is neither an exclusive sanction nor a prerequisite to other sanctions. Even when the registration statement becomes effective not by lapse of time but as a result of an acceleration order there is no Commission ruling that the statement meets the requirements of the law. Sections 11, 12 and 24 of the Securities Act impose civil and criminal sanctions for false statements (*inter alia*) in an effective registration statement, and Section 23 expressly declares that effectiveness of the registration statement shall not be deemed a Commission finding that the statement is sufficient even on its face, or that the Commission has approved the security. It is made a criminal offense to represent otherwise. Thus the process of obtaining an effective registration statement is not a process of obtaining an affirmative authorization by the Commission or a determination of compliance. It is merely a submission of the statement to a preliminary screening process in the course of which the Commission has an opportunity to challenge the statement prior to its effectiveness.

The fact that the Securities Act contains non-administrative sanctions which may be enforced in a private action for damages or in a criminal prosecution, and that these sanctions remain operative after the registration statement has become effective and are seriously regarded by the financial community,¹⁶ has an important bearing upon

¹⁶ The President's Message of March 29, 1933, recommending enactment of securities legislation proposed to add "to the ancient rule of *caveat emptor* the further doctrine 'let the seller also beware.'" The financial community complained that under the act as first enacted the civil liability sanctions were

the Commission's administrative task. Without these sanctions it is questionable whether it would be possible for the Commission to police a vast number of registration statements covering a wide variety of businesses with the expedition demanded by financial transactions. Because there are such sanctions the process of registration has developed into what is much more in the nature of a collaborative effort on the part of the industry and the Commission's staff than is the case in many other administrative proceedings in which the obtaining of agency action or inaction has more definitive consequences.¹⁷

To the responsible underwriter or officer of the issuing company the possibility of putting something over on the Commission and getting by with a less than adequate registration statement is obviously not worth running the risk of being liable for rescission or damages. In this atmosphere "cooperation" with the administrator means not merely trying to find out just what the administrator thinks is necessary to comply with the law and how his demand can most easily be satisfied with a view to avoiding controversy; it means affirmatively calling attention to difficulties and borderline problems where the registrant or underwriter may be in doubt as to the relevance of a particular disclosure and desires advice as to whether its inclusion is required.

so drastic as to impose prohibitive risks upon underwriters and upon officers and directors of issuers. The 1934 amendments moderated the original provisions with respect to civil liability and the arguments about prohibitive risks have been largely dissipated by subsequent experience. It was pointed out in the Commission's Tenth Annual Report (p. 2) that although 4,510 registration statements with respect to securities aggregating more than twenty-five billion dollars had become effective by June 30, 1944, a search of the court records covering a period of eight years revealed that there were less than two dozen actions under the civil liability sections of the Securities Act and that apparently not more than five suits had resulted in recovery by the plaintiffs.

¹⁷ Of course there have been in this as well as other fields of regulation differences of opinion as to whether the public interest requires particular restraints upon business practices. But in the case of the Securities Act differences of this nature have developed primarily with respect to what the statute or rules should require.

These incentives for industry collaboration are, of course, less operative in the case of the more irresponsible fringe of the financial community or in the case of the more highly speculative promotions where the promoter has a long-shot chance of getting rich out of a venture in which the public contributes the capital and runs all the risk. But so far as the registration process is concerned, the impact of the Securities Act is much more on the respectable and established concerns than upon the promotional.¹⁸

Even where there are differences of opinion between the Commission's examining staff and the registrant as to the desirability of making disclosures, the registrant will usually wish to settle them informally, either because of a desire to avoid a public controversy over a question as to whether a false or misleading statement has been filed, or because the particular offering is geared to a time schedule which leaves no room for formal hearings, separation of functions, hearing officer's intermediate decisions, briefs and arguments before the Commission, or judicial review.

Because of the nature of the registration process the Commission has recognized from the outset of its admin-

¹⁸ The more speculative types of promotions may not be subject to the registration process by reason of the exemptions applicable to offerings in limited amounts. Under the exemption procedure a simple form of notification is filed, coupled with copies of all sales literature used. The exemption from registration does not relieve from the fraud sanctions of the act or preclude institution of injunctive or criminal proceedings or a court action based on misstatements in the sale. Many fraudulent promotional schemes have sought, unsuccessfully, to avoid the reach of the act entirely by dressing the transaction up as a sale of interests in land or tangible personal property. See, for example, *SEC v. Payne*, 35 F. Supp. 873 (S. D. N. Y., 1940) (silver foxes); *SEC v. Cultivated Oyster Farms*, 1 SEC Jud. Dec. 672 (S. D. Fla., 1939) (oyster bottom acreage); *SEC v. Bourbon Sales Corp.*, 47 F. Supp. 70 (W. D. Ky., 1942) (whiskey-bottling contracts); *SEC v. Joiner*, 320 U. S. 344, 64 Sup. Ct. 120, 88 L. ed. 88 (1943) (oil and gas leases).

The Act defines security broadly to include any "investment contract" and that definition has been held to include, quite apart from the question of fraud, an arrangement by which the investor expects to profit from the efforts of others even where the transaction takes the form of a sale of land coupled with a management contract. See *SEC v. W. J. Howey Co.*, et al., 328 U. S. 293, 66 Sup. Ct. 1100, 90 L. ed. 951 (1946).

istration of the Securities Act the desirability of developing flexible and efficient informal procedures in connection with the registration process. The Commission's pre-Administrative Procedure Act attitude toward this problem was thus summarized in its Tenth Annual Report:

Ordinarily this procedure [referring to the formal procedures under Section 8 of the Securities Act] is unnecessary and the Commission does not resort to it except in those cases where there has been a definite or intentional effort to conceal or mislead.

In the interest of good administration, fair treatment of registrants, and minimum interference with business, a procedure not specifically spelled out in the Act was adopted early in its administration. Registrants are informally advised of any material misrepresentations or omissions as promptly as possible after the statements are filed, thus affording an opportunity for the filing of correcting amendments before the statements become effective. Through this "letter of deficiencies" the Commission is able to advise the registrant of the information that must be corrected or supplemented in order to meet the disclosure standards prescribed by Congress. Another informal procedure that has proved useful is the prefiling conference in which representatives of registrants and underwriters discuss problems in connection with the proposed filing with the Commission's staff for the purpose of determining in advance what types or methods of disclosure would be necessary under the circumstances of the individual case. This informal method of handling cases has injected an element of flexibility into the registration procedure which has proved so satisfactory that it has not been necessary to issue a stop order since 1941.¹⁹

The instances where formal proceedings have been instituted without exhausting the possibilities of informal adjustment have reflected the same standards of decent administration which Section 9(b) of the Administrative Procedure Act expressly makes applicable in the event of a "withdrawal, suspension, revocation, or annulment of

¹⁹ Since this report was issued the Commission has had occasion to institute several stop order proceedings. No stop order has issued in any of these cases. For reference to a pending case see Red Bank Oil Company, Securities Act Release Nos. 3095 and 3184.

any license," i.e., informal sanctions are sought except in "cases of willfulness or those in which public . . . interest . . . requires otherwise."²⁰

The most obvious ground for the institution of a stop order proceeding is where there is reason to believe there has been a deliberate effort to mislead or "willfulness" is otherwise indicated by what appears to be the absence of any bona fide effort to comply with the requirement of the Act or rules. In other situations, where the registration statement as filed is so manifestly defective that it is impossible to formulate a deficiency letter specifying just what changes are necessary to comply with the statute, or where time does not permit more informal procedures, the "public interest"—more specifically the statutory policy to prevent a defective statement from becoming effective—might require the institution of the stop order proceeding without any indication that what has been filed was intentionally misleading. In such a case, however, it is the policy of the Commission to suggest the filing of a "delaying amendment,"²¹ or even withdrawal, with a view to encouraging filing of a completely rewritten statement after conference with the staff. If the suggestion is accepted and adequate corrective action taken, a formal proceeding will be unnecessary.

Where formal proceedings are found necessary it is the established policy of the Commission, antedating the Administrative Procedure Act, to accord those procedural safeguards which the Act makes mandatory in all proceedings other than those involving rule-making and determining applications for initial licenses. The applicable Commission procedures include notice; hearing upon spe-

²⁰ Reference in the text is made to § 9(b) rather than § 5(b) of the act, which, while broader in scope, lays down a less compelling standard with respect to administrative efforts at informal adjustment.

²¹ Since, absent Commission acceleration, the filing of an amendment starts the running of a new 20-day period preceding automatic effectiveness of the registration statement, it is the practice to avoid crowding the Commission into institution of formal proceedings to file amendments which may have the sole purpose of starting the running of a new 20-day period.

cific charges as to deficiencies; a hearing officer subject to separation of functions; and a recommended decision of the examiner with opportunities to brief and argue before the Commission exceptions to the examiners' findings and rulings. The Commission practice has always emphasized the desirability of maintaining separation of functions also at the opinion writing level. Those assisting the Commission in the preparation of opinions involving contested issues of fact are completely independent from the administrative divisions having the responsibility for the investigation of the case and the development of the record at the hearing.²² Because of this administrative policy, which of course has not been changed by the Administrative Procedure Act, it may never become necessary for the Commission or the courts to decide whether such proceedings do in fact fall into a category where the Act makes all these procedural safeguards mandatory.

If it should become necessary to classify proceedings under Section 8 of the Securities Act in terms of the definitions contained in the Administrative Procedure Act, there will be plenty of room for argument. This may be illustrated by specific references to the definitions contained in the Administrative Procedure Act. Is a formal proceeding such as that authorized by Section 8(d) of the Securities Act to prevent a deficient registration statement from becoming effective or to terminate its effectiveness "rule-making"?²³ While, as previously indicated, the Commission would not normally regard it as fair to

²² The Commission determination is reflected in a formal published opinion and order which the Securities Act expressly makes subject to judicial review in the Circuit Courts of Appeals.

²³ Section 2(e) of the Administrative Procedure Act provides:

"'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule-making' means agency process for the formulation, amendment, or repeal of a rule."

the registrant to apply in this context the procedures which the Administrative Procedure Act recognizes as appropriate in connection with "rule-making," nevertheless, it is interesting to note how strong an argument can be made, as a matter of formal analysis, for classifying a stop order proceeding under Section 8(d) of the Securities Act as rule-making.²⁴ Thus it might be argued that the end result of a stop order proceeding is merely to prescribe the extent to which the statement must be amended to correct indicated deficiencies and in that respect the proposed action is akin to a prescription for the future of accounting (which is one of the specific illustrations of rule-making). The fact that the Commission's order will apply only to the particular registration statement does not exclude it from the category of rule-making since a rule may be of "general or particular applicability." Nor is it conclusive against treating the Commission's determination as "of future effect" that its order is based upon the application of existing requirements of the Securities Act and of the Commission's forms and regulations to what the registrant has theretofore submitted as its proposed registration statement, since a "rule" under the Administrative Procedure Act may "implement" or "interpret" as well as prescribe law or policy. Perhaps the crux of the problem is whether the Commission's order should be regarded as of "future effect." The order has the important future effect of preventing future sales of securities from being made pursuant to an effective registration statement. Unless and until the stop order is set aside on review, or the Commission accepts an amendment

²⁴ To simplify presentation references in the text are limited to the type of formal proceeding authorized by § 8(d) of the Securities Act. Such a proceeding may be instituted "at any time," i.e., before or after the registration statement becomes effective "if it appears to the Commission . . . that the registration statement includes any untrue statement of a material fact" or there is a material omission. A more limited and less frequently used procedure is specified in § 8(b), applicable only where the deficiency appears on the face of the statement and only if instituted within ten days after the challenged filing. See Red Bank Oil Company, Securities Act Release No. 3095, discussing the distinction between the two types of proceedings.

as curing the deficiencies and declares the statement effective, such sales would be in violation of Section 5(a) of the Securities Act.²⁵ This is the direct and articulated statutory consequence. The stop order does not amount to a reparation order dealing with past sales nor impose any penalty for such sales.

If the stop order should be regarded as having anything other than "future effect" it is only an incidental consequence of the Commission's having made a finding for the purpose of its prospective ruling that the statement theretofore filed is false and misleading. It is not clear what effect the Commission's administrative determination in a stop order proceeding would have in the event of civil litigation under Section 11 or 12(2) of the Securities Act in which a purchaser claiming to have been misled might seek rescission or damages. Such a ruling by the Commission would in any event have some persuasive weight with the court having jurisdiction over the related civil action and might be the means of directing security holders' attention to the misleading character of the statement and would, of course, reflect adversely upon the persons concerned.²⁶ At least in this intangible

²⁵ The consequences of selling under an effective registration statement not meeting the requirements of the Securities Act is to relieve persons participating in the sale from the specific criminal and civil sanctions applicable to a violation of § 5(a) but not from civil or criminal consequences imposed by reason of the misstatement. The principal practical consequence relates to the character of the proof to establish a violation. Thus, proof of violation of § 5(a) requires only proof of the defendant's participation in the sale of an unregistered security. If a registration statement is in effect, the proof of violation must include proof of a material untruth or omission in the statement.

²⁶ *Jones v. SEC*, 298 U. S. 1, 56 Sup. Ct. 654, 80 L. ed. 1015 (1936) held that the commencement of stop order proceedings by the Commission before the effective date prevents a registration statement from becoming effective, and that where there has been no sale of the securities sought to be registered the Commission could not justify on considerations of public interest refusing to permit a withdrawal of the statement challenged in the stop order proceeding. Where, however, the registration statement had become effective and all securities covered thereby sold prior to the commencement of the stop order proceeding, the Commission has been upheld in refusing to permit the withdrawal and continuing the stop order proceeding notwithstanding the purported withdrawal. The latter holding was based upon the consideration that purchasers of the securities in question were entitled to be apprised of the fact that the registration statement, a matter of public record, was false and misleading. See *Oklahoma-Texas Trust v. SEC*, 100 F. (2d) 888 (C. C. A. 10th, 1939).

sense the Commission's decision in the stop order proceeding would involve passing judgment on the past conduct of the persons responsible for filing the registration statement. While these intangible characteristics have seemed, prior to the Administrative Procedure Act, highly persuasive grounds for treating the proceedings as of an accusatory nature and according the procedural safeguards mentioned above, there may be room for debate as to whether the Administrative Procedure Act test of whether an order is of "future effect" was intended to turn upon such intangible considerations.

Assuming, for the moment, that a formal proceeding under Section 8 of the Securities Act is not "rule-making," is it "licensing"? Section 2(e) of the Administrative Procedure Act defines "license" to include "any agency . . . registration" and defines licensing to include agency process respecting the grant . . . denial, revocation, suspension . . . or conditioning of a license." An initial question is raised as to whether registration under the Securities Act which becomes effective by mere lapse of time is a "license" within the above definition. If registration under the Securities Act does not involve a license then a formal proceeding for the revocation, suspension or conditioning of the registration statement would not be a "licensing" procedure.

But assuming that an effective registration statement should be regarded as a license, how shall we classify a formal proceeding challenging the sufficiency of a registration statement instituted (1) prior to effectiveness, or (2) subsequent to effectiveness? Each of these proceedings might be regarded as a determination of an application for initial license since the "license" has not theretofore been passed upon by the agency—or conceivably only the proceedings instituted prior to effectiveness would be treated as determining the application for an initial license. So far as the policy of according separation of function is concerned, the Commission recognizes no such distinction

and as noted above its policy is to maintain "separation of function" in either case. It has also been the Commission's practice to have advisory reports of the examiner in such cases corresponding in substance to the "recommended decisions" contemplated by the Administrative Procedure Act.²⁷

Stop order procedures under the Securities Act thus furnish an illustration of a situation to which is applicable the admonitions in the Committee reports that "there are, however, some instances of either kind of case [applications for initial licenses and rule-making] which tend to be accusatory in form and involve sharply controverted issues. Agencies should not apply the exceptions to such cases because they are not to be interpreted as precluding fair procedure where it is required." See Senate Report, p. 18. Substantially identical language appears in the House Report, p. 30.

Another Securities Act procedure relating to the registration process is the acceleration by the Commission of the time in which registration statements or amendments would otherwise become effective.²⁸ One of the evils in

²⁷ Conceivably a case might arise where the registrant indicates an intention to continue selling securities in the face of a stop order proceeding challenging a previously effective registration as false and misleading, and where the impracticability of an intermediate decision is manifest because of time factors. This would make it necessary to determine whether, as applied to the particular proceeding, such a step would be mandatory under the Administrative Procedure Act. Section 8(a) of the Administrative Procedure Act requires a recommended decision of the hearing officer "except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires." Is this to be read literally as making the recommended decision mandatory in cases other than rule making despite a situation in which the record warrants a finding by the agency that "due and timely execution of its functions imperatively and unavoidably" requires that the procedure be omitted? If this is the proper construction of § 8(a), then in the event of such a situation developing it would, of course, become necessary to ascertain whether the particular case fell outside the categories of "rule making or determining applications for initial licenses."

²⁸ Under § 8(c) of the Act, an amendment filed after the effective date of the registration statement may become effective only by affirmative action of the Commission. The discussion in the text refers only to amendments filed prior to the effective date of the statement.

past security practices was that of making a public offering and selling the entire issue immediately and without any real opportunity for dealers and investors to consider the merits of the security offered. The waiting period in the Securities Act was designed to afford a check against such high pressure methods. Its principal objective is to give prospective investors and dealers an opportunity to absorb the information publicly revealed in the registration statement. It also affords an opportunity for Commission examination and taking of such informal or formal action as may be necessary to correct obvious deficiencies.

Assuming the Commission has had an opportunity to scrutinize the statement and that initial indicated deficiencies have been corrected by amendments, the Commission may find it appropriate both from the point of view of public information and the point of view of discharge of its own functions to grant a request for acceleration of the effective date of the amendment.²⁹ Since August 22, 1940, the Commission has also had discretionary authority under the Securities Act to accelerate the statement, whether or not amended, so as to permit it to become effective within the 20-day period from the initial filing. Acceleration is possible only where as a result of pre-filing conferences, or because of the relatively simple nature of the financial proposal which is registered, the statement lends itself to prompt analysis by the Commission and by the prospective investor.³⁰

²⁹ Acceleration may be important to the registrant for a variety of reasons, including a desire to take advantage of market conditions regarded as currently favorable, to make it possible to use year-end audited financial statements permissible if within six months (or in some instances, ninety days) of the offering date, or to save duplicate interest or dividend charges in connection with a refunding operation.

³⁰ The use of the so-called "red herring" prospectus distributed in advance of the effective date of the registration statement is a method which the Commission has encouraged of assisting the public in absorbing in advance of the effective date the information contained in a pending registration statement. Recent emphasis was given to this practice by Rule 131 under the Securities Act effective Dec. 6, 1946, see Securities Act Release No. 3177.

Where the financial proposals are unduly complicated from the point of view of either Commission analysis or public comprehension, acceleration may be denied. Complicating the program from the point of view of public comprehension may be in part the result of pursuing questionable, although not prohibited, financial practices.³¹

Despite the practical importance of acceleration to the issuer, time does not permit anything more than the most informal procedures. The objective of cutting short a waiting period which would amount to only 20 days in the absence of Commission action would be defeated by attempting to afford opportunities for formal argument, or preparation of opinions to explain the grant or denial of acceleration. Where acceleration is granted it is reflected in an "order" which becomes part of the public registration record. Where acceleration is denied no formal action is taken and the Commission's determination not to accelerate is verbally communicated to the applicant. Consideration has been given by the staff of the Commission to the question of whether the Administrative Procedure Act might require greater formality of procedure. The Securities Act does not require opportunity for hearing in connection with requests for acceleration and determinations in connection therewith are therefore not subject to Sections 5, 7 and 8 of the Administrative Procedure Act. Section 3(b) of the Act requires publication of "all final opinions or orders in the adjudication of cases" unless declared for good cause to be held confidential and not cited as precedents. Denying acceleration is interlocutory in the sense that it has no finality with respect to the process of obtaining an effective registration, since the statement denied acceleration will (unless the Commission institutes formal proceedings) automatically become effective in 20 days or less. Nor does the Securities Act contemplate the entry of an order denying

³¹ See Securities Act Release No. 2340, Aug. 23, 1940. For an early published opinion see *Matter of Callahan Zinc-Lead Co.*, 1 SEC 115.

acceleration. To formalize the process by an order which would, like orders granting acceleration, become part of the registration record, would not be desirable from the point of view of registrants. Making such an order public might reflect unfavorably upon the contemplated security offering, thereby making the failure to obtain acceleration a sanction such as the Commission would not consider fair on the basis of the necessarily hasty and informal procedures involve.

Public Utility Holding Company Act.—The Public Utility Holding Company Act provides for the reorganization and simplification of holding company systems and for regulation of most of their important financial transactions. Proceedings under Section 11(b) of the Holding Company Act to determine “by order” the action which a particular company must take by way of geographical or corporate simplification are initiated by the Commission. Most of the other administrative proceedings are initiated by the companies subject to regulation, and the object of such a proceeding is to secure approval or other authorization of a proposed transaction—including, among other important transactions, plans of reorganization designed to accomplish compliance with Section 11. Notice and opportunity for hearing are mandatory in connection with Section 11(b) proceedings and reorganization plans, and as a prerequisite to a rejection of proposals subject to Commission authorization.³² It is the Commission’s practice to give public notice and opportunity for hearing in

³² For example, § 10(d) provides for Commission disposition of applications for approval of an acquisition by “an order either granting or, after notice and opportunity for hearing, denying approval of the acquisition.” Section 7(b) authorizes the Commission to fix by rule a period in which a “declaration” proposing to issue a security might become effective by lapse of time unless the Commission issues an order to show cause. Most of the other types of transactions submitted for Commission approval are pursuant to Commission rules adopted under Sections of the act making it unlawful to consummate such transactions in contravention of Commission rules and orders. Section 20(c) of the act provides that orders of the Commission shall be issued “only after opportunity for hearing” but does not prescribe notice to the public. See also § 19 providing that “hearings may be public.”

connection with all proceedings looking to the entry of a Commission order, except of course that public hearings are not held in connection with requests for confidential treatment of information filed with the Commission.

Because the Holding Company Act requires affirmative findings of compliance with public interest standards as a condition to granting important authorizations, and because of the nature of the problems involved, the ordering of a public hearing does not imply opposition to a proposal, and, so far as the Commission's staff is concerned, hearings are frequently exploratory rather than adversary in character.

Informal procedures are highly developed and serve to assist the industry in effecting compliance, to simplify or avoid necessity for hearings, or to assist competing interests in reaching a basis of compromise. Such procedures may and frequently do include a pre-filing conference, but since a public hearing carries with it no imputation of misconduct, and may be required in any event to give public security holders an opportunity to voice objections, informal negotiations with the Commission's staff and amendments modifying the company's proposal are at least equally important after a hearing has been ordered as before. Indeed such informal procedures may continue throughout the hearing and down to the moment of Commission action.³³

Security holders and others affected by the proposed transactions are permitted to participate at the public hearings and any person, whether or not a party, may seek judicial review under Section 24(a) of the act if "aggrieved" by the decision. Most of the disputes as to procedure under the Holding Company Act have turned about the problem of the procedural rights of such public security holders.

³³ It is the usual practice not to close the hearing until about the time of formal action by the Commission but to adjourn it subject to the call of the examiner in order to make possible consideration of last minute changes.

While the Holding Company Act in general makes notice and opportunity for hearing mandatory only in connection with Section 11 orders and reorganizations and as a condition to the denial of authorization for the consummation of a proposed transaction, it has always been the policy of the Commission to accord public security holders, as well as the interested state authorities, an opportunity for hearing as a preliminary to passing on financial transactions.³⁴ Where a public hearing is held Section 19 of the Holding Company Act requires the Commission to "admit as a party" interested state authorities, but makes the participation of interested security holders and others dependent upon a Commission determination *inter alia* that their "participation in the proceedings may be in the public interest." The Commission's practice has been to authorize the hearing officers to grant limited rights of participation on a liberal basis which may vary from a mere opportunity to make a statement to active participation in the development of the record, including cross-examination of company witnesses, and filing of briefs (Rule of Practice XVII(e)).³⁵

Formal intervention may be accorded only by the Commission and only upon a showing to the Commission that such limited rights of participation as may have been accorded by the examiner are inadequate to protect the interest of the security holder in question. Not infrequently a protesting security holder appears at an early stage of the proceedings, demands full rights of inter-

³⁴ For a time it was the practice to have a formal hearing in all cases even where no opposition developed and the formal record consisted of nothing more than the company's sworn application. Effective July 9, 1940, the Commission adopted a simplified procedure in which public notice is given of the filing of the company's financial proposal and interested persons are given an opportunity to request a hearing in connection therewith. See Holding Company Act, Rule U-23. This procedural change, which was the subject of some difference of opinion within the Commission, is described in the Commission's Sixth Annual Report, p. 49. See also Seventh Annual Report, p. 118.

³⁵ The examiner has no authority to accord the privilege of oral argument before the Commission but the Commission itself follows a liberal policy in according that privilege.

vention and is not heard from again. To avoid burdening the other parties to the proceeding and the Commission with the necessity of giving formal notice to such ephemeral participants, Rule XVII(c) of the Commission's Rules of Practice provide that unless the hearing officer otherwise directs, at the request of a person granted limited participation, he will be expected to inform himself of developments by attendance at the hearing and examination of the public record of the proceeding and shall not be entitled, as of right, to other notice of developments nor to service of copies of briefs and motions of the parties.

Generally speaking, it is not feasible to include potential objectors in pre-hearing or other informal discussions with company representatives which are held in an effort to iron out controversial features of their proposals. In *Phillips v. SEC*, 153 F (2d) 27 (C. C. A. 2d, 1946), an objector claimed that by reason of pre-hearing discussions he had been denied procedural due process, although accorded full opportunity to be heard before the examiner, and to brief and argue before the Commission his objections to the company proposals. The opinion of the Circuit Court of Appeals for the Second Circuit, affirming the Commission's action, said in part (at p. 32) :

He contends further that the Commission made an *ex parte* adjudication on the question of the necessity for a shareholders' vote. This is based upon conversations between United's president and members of the Commission or its staff, developing the latter's view that such a vote was inappropriate under the circumstances. These conversations seem to us no more than legitimate pre-hearing conferences, of the kind which the commissioners or their staff must have if all the intricate details involved in even a single holding-company simplification is to be carried to completion within the time of man.* Certainly a court would not be justified in interfering with such helpful preliminary confer-

*See pp. 102-104 of the Monograph on the Securities and Exchange Commission prepared by the staff of the Attorney General's Committee on Administrative Procedure; emphasizing the usefulness of the procedure."

ences to expedite the settlement of details without a very definite showing of prejudice to an aggrieved party or eventual denial of a fair hearing. Here the Commission, as it showed at its hearings, did not hold itself bound by any of the preliminary steps, but gave the final judgment upon its view of the law—which coincides with our own, as we have shown—and in the exercise of a discretion which appears rational and reasonable.

This practice of according limited rights of participation is expressly recognized in Section 2(b) of the Administrative Procedure Act and both the House and Senate reports (pages 19 and 10-11, respectively) state that the practice of admitting persons for limited purposes does not, of course, authorize an agency "to ignore or prejudice the rights of the true or full parties" to a proceeding. Effectuation of this policy would seem to require a holding that persons whose participation is in the discretion of the agency have no standing under the Administrative Procedure Act to complain of the failure to accord procedures which the true or full parties may desire to waive.

Consideration of whether particular procedural safeguards may be required by the Administrative Procedure Act or, if not required, are desirable as a matter of policy, presents separate and sometimes conflicting considerations from the point of view of the companies subject to regulation who may be the primary parties of interest and from the point of view of objecting security holders. The relative weight to be accorded to their respective procedural interests may depend upon the nature of the proceeding and whether the public security holder has the kind of a direct interest which would give him standing to sue in ordinary litigation, or has merely a derivative interest otherwise adequately represented by other parties to the proceeding and therefore would not have a standing for purposes of ordinary litigation.³⁶

³⁶ In *American Power & Light Company, Inc. v. SEC* and *SEC v. Okin*, 325 U. S. 385, 65 Sup. Ct. 1254, 89 L. ed. 1683 (1945), it was held that the usual criteria of standing to sue for purposes of ordinary litigation do not limit rights of review of security holders under § 24(a) of the act, where

To accord full procedural rights to the public security holder would conflict with the policy of the Administrative Procedure Act to encourage informal disposition which is evidenced by Section 5(b). On the other hand, Section 5(b) of the Administrative Procedure Act qualifies the requirement that an opportunity for informal disposition be accorded by the express condition that "time, the nature of the proceeding and the public interest permit." It would seem that the broad public interest in transactions subject to the Holding Company Act and the nature of the proceedings fully justify the Commission in according such formal procedures as may be necessary to give adequate opportunity for expression of investor protests.

Of course, the Administrative Procedure Act would not deprive public security holders of any procedural rights to which they might be entitled as a matter of due process or otherwise, apart from the requirements of the Act (see Section 12).

On the other hand, the Administrative Procedure Act certainly does not evidence a Congressional intention to enhance the obstructive potentialities of persons who, apart from the Administrative Procedure Act, would not be entitled as of right to become parties to the proceeding. For that reason, it is the Commission's policy to accord to public security holders the fullest possible opportunity to present their views consistent with the orderly and timely disposition of proceedings under the Holding Company Act.

Prior to the Administrative Procedure Act the Commission did not ordinarily provide for examiners' reports

the security holders have an economic interest in the transaction and where the stockholders' interest is either a distinct one from that of the corporation or where the stockholder having merely a derivative interest is in disagreement with the management. The Okin case did not pass upon the question of whether the contentions of the minority stockholder in question were frivolous or otherwise lacking in merit nor did it deal with the stockholders' rights of participation in the administrative hearing.

in Holding Company Act cases. Its reasons were stated in its comment dated July 25, 1945, on S. 7³⁷ (at p. 5-6):

We have found the process of preliminary consideration by an examiner, the making of advisory findings by the examiner, and Commission consideration upon briefs and arguments on exceptions to the examiner's report, a fair and efficient procedure only when the determination which we are required to make is one with respect to which the issues of fact are relatively substantial and the range for policy determinations or financial judgment is narrow. Examples are stop order proceedings on the ground that a registration statement is false or misleading or in other respects fails to comply with applicable standards, and proceedings to revoke the registration of a broker or dealer on the ground that there had been a 'willful violation' of the Securities Act or the Securities Exchange Act.

On the other hand, our experience with the Holding Company Act has indicated that trial examiners, for the very reason that we have been at pains to isolate them from participation in the broader phases of the administration of our statutes (which is an express requirement of the bill) have relatively little to contribute to the resolution of the complex questions of financial judgment and policy which arise under the Holding Company Act. Every case under the Holding Company Act represents a segment of a nation-wide problem which must be determined on the basis of a uniform Congressional policy. The examiner, whatever his personal qualifications may be, has no opportunity to see more than dismembered segments of the over-all picture. Moreover, problems under that Act seldom involve issues of fact which turn substantially upon the credibility of witnesses. The basic data in the typical Holding Company Act record consists of earnings statements, balance sheets and statistical data showing revenues, expenses, cost of assets, growth of consumption, population trends and the like. The issues involve the interpretation of this data and the application of policy standards in the Act. To the extent that there may be so-called expert testimony the opinions expressed by the witnesses are largely as to the ultimate issues which it is the Commission's statutory responsibility to decide.

³⁷ Submitted to the Senate and House Committees on the Judiciary. Page references are to the mimeographed comment as submitted to the Committees.

"Separation of function" has presented a somewhat different problem in Holding Company Act procedures. The Commission has attempted to observe the principle of separation of function in controversial cases even where the controversy is more as to policy than as to fact except where inconsistent with according timely relief to the private parties having the dominant interest in the proceeding. As the Commission stated in its 1945 comment on S. 7 (at pp. 12-13 of Appendix to Statement):

We also believe that where the agency is itself deciding disputed issues of fact on the basis of a record made before an examiner (whether or not there are preliminary findings by the examiner) it should guard itself against permitting its views as to evidentiary facts being colored by *ex parte* discussions with staff members who have the responsibility for making the record in the case. For this reason we have a separate Opinion Writing Office, composed of drafting attorneys and experienced supervisors, which takes no part in the investigation, preparation, or trial of cases, and may not discuss the issues with those who have taken an adversary position. We employ the staff of our Opinion Writing Office to assist us in analysing the record and in preparing our opinion in cases where a contested issue has developed between the interested division of our staff and one or more private parties. The Opinion Writing Office is used not only in proceedings which we have initiated but also, when the applicant's time schedule permits, in proceedings which the bill would characterize as applications for licenses.

We believe, however, that the problem of separation of functions as it applies to the various statutes we administer resolves itself into determining what procedure would be most effective to assure a fair hearing under the varying circumstances of particular cases. Any rigid legislative requirement of particular procedures to be followed in all cases would interfere unduly with efficient functioning of the agency without resulting in any commensurate benefit to private parties, indeed, in some cases with harmful results to such parties.

* * *

For example, where the proceeding is not essentially prosecutory in character and there are no substantial issues of fact

turning upon the credibility of witnesses, there is far less reason for the agency to shield itself from possible bias of its staff and far greater need for the agency to draw upon the diverse experience and expert qualifications of members of its staff. The purpose of such consultations is to guide the agency in the broader policy issues involved and to enable it to consider the relation between the immediate problem before it and other problems with which the staff may be familiar. Such consultations may be primarily to assist the agency in writing an opinion which will be a guide to the industry in related problems rather than to reach an actual decision in the particular case. It is, however, impossible to separate the decision of the immediate issue from the discussion of its broader implications.

It is our policy, even in cases where the questions in dispute are largely as to policy rather than fact, to exclude from participation in our decisions persons who may have taken a definite position as advocates on the issues.

This comment recognized that the bill then before the Committee had made the requirements with respect to intermediate decisions of the examiner, and with respect to separation of function, inapplicable in cases involving the determination of applications for initial licenses and rule-making. Rule-making was then defined more narrowly than in the act, but so as to include "rate making or wage or price fixing." The Commission pointed out that under the Holding Company Act important regulatory proceedings initiated by the Commission, including those designed to require changes in accounts and to require a reorganization or divestment of properties, are "no more prosecutory in character than proceedings to determine applications for license or to fix rates or prices."³⁸

These suggestions, as well as those of other agencies, appear to have been taken into account in the subsequent broadening of the definition of rule and rule making. The present definition not only makes it clear that a rule may have "particular" as well as "general" applicability, but

³⁸ The comment also questioned the relevance of distinguishing between granting and revoking licenses.

also added by way of specific illustration of what may be the subject of rule-making "the approval or prescription . . . of corporate or financial structures or reorganizations thereof . . . , facilities . . . or accounting."³⁹ It would seem therefore that the Act in its final form does not make mandatory either examiners' reports or separation of function in the bulk of the procedures under the Holding Company Act. Nevertheless, separation of function continues to be a matter of Commission policy even where not required,⁴⁰ and the question of whether there shall be an examiner's report is not foreclosed by the rules of practice but is left open in the event of disagreement between the parties to the proceeding.

This expansion of the definition of rule-making in the course of the legislative history raises the question whether the definitions of rule-making and licensing may not be

³⁹ The Attorney General's comment contained in Appendix B of Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945) states at 39:

"Proceedings are classed as rule making under this act not merely because, like the legislative process, they result in regulations of general applicability but also because they involve subject matter demanding judgments based on technical knowledge and experience."

⁴⁰ In this respect the Commission's policy with respect to separation of function goes even beyond the admonitions in the Committee reports maintaining separation of function in cases involving applications for initial licenses and rule-making where those proceedings "tend to be accusatory in form and involve sharply controverted factual issues." See pp. 30a-31, *supra*, discussing the applicability of this admonition to "stop order" proceedings under the Securities Act of 1933. In many Holding Company Act proceedings, however, it may be impractical and undesirable to maintain separation of function to the same degree as would be appropriate in a stop order proceeding. For example, where informal negotiations with the parties to the proceedings happen to overlap controversial formal procedures, it may be essential to adequate and timely consideration of informal proposals that the Commission have the benefit of discussion with staff members who have taken an adversary position on controversial issues. Or again, where the time factor is unusually pressing, the need of private parties for expeditious decision may require assistance in the decisional process of staff members already familiar with the record despite the fact that they have taken an adversary position. Even in such a case, however, it may be feasible to obtain collaboration of members of the Commission's Opinion Writing Office, in making an independent analysis of the record, so as to assist the Commission in guarding against having its understanding of the case colored by the viewpoint of staff members who have been in an adversary position.

overlapping in the bill in its final form. If they are not overlapping then the expanded definition of rule-making may require a more restrictive reading of licensing than would have been appropriate for the same words as used in the context of the earlier bills. Generally speaking, the same relaxation from otherwise applicable procedural requirements are permitted in the case of both rule-making and granting an application for an initial license. However, consideration must be given to the requirement of Section 4(c) with respect to the effective date of any "substantive rule" (excluding "one granting . . . exemption or relieving restriction . . ."). It would seem that the intention was to make the requirement applicable only in the case of rules of general applicability and in any event not to decisions of particular applicability based upon a record and after opportunity for hearing. As applied to the enactment of rules of general applicability the obvious purpose is to prevent surprise application of new rules of conduct to a regulated industry—in other words, what has been referred to as "hip pocket law." In the case of determinations of particular applicability the Administrative Procedure Act evidences no intention to impose any time restrictions not explicit, or implicit, in regulatory statutes applicable to individual agencies. For example, there is no suggestion of such a requirement in connection with the revocation of licenses, which is the type of procedure which the Act attempts to surround with the maximum of procedural safeguards. If despite these considerations it should be contended in a particular case, not involving generalized rule-making, that the 30-day time lag requirement may be applicable, then the Commission would of course have to give consideration to the question of whether or not it should make a finding with respect to "good cause" if in fact there does appear to be sound reason for making its determination effective without a minimum delay of 30 days from publication of service.

Other SEC Statutes.—Under the Investment Company

Act of 1940 the Commission regulates activities of companies which are engaged primarily in the business of investing, reinvesting and trading in securities. Disclosure of the finances and investment policies of such companies is secured through registration with the Commission. The Act prescribes qualification of officers and directors, requires that such matters as management contracts and changes in the nature of the investment company business or investment policies must have the approval of stockholders, restricts the issuance of senior securities, forbids pyramiding and cross-ownership of securities, prohibits transactions between the investment company and its affiliates and insiders unless "exempted" from such prohibition by the Commission and otherwise regulates the activities of investment companies.

Nearly all proceedings leading to Commission determination in cases which arise under the Investment Company Act are instituted by private parties seeking either exemption from specific provisions of the Act or seeking a determination that they do not come within the general application of the Act. The Act contains over fifty different statutory provisions for Commission orders. Although under these circumstances it is of course difficult to generalize, the problems of conforming Commission procedures thereunder to the letter and spirit of the Administrative Procedure Act are often akin to some of those arising under the Public Utility Holding Company Act.

In general, the regulatory scheme is a less pervasive one than that contained in the Holding Company Act and proceedings thus far have not involved participation by objecting security holders to the extent that has occurred in Holding Company Act proceedings. Unlike the Holding Company Act, the Investment Company Act gives the Commission no power to pass administratively upon the fairness of reorganization plans affecting companies subject to the Act, although in certain circumstances it may render advisory reports thereon and the Commission is authorized to

bring injunction proceedings to restrain a "grossly unfair" plan.

The Securities Exchange Act of 1934 (cited in note 7) contains many separate regulatory provisions which differ in their procedural aspects and cover such varied matters as registration of national securities exchanges (Section 6); registration of securities for purposes of exchange trading, and according unlisted trading privileges to certain securities (Section 12); periodic reports by issuers of registered securities (Section 13); prohibition against manipulative practices both on and off the exchanges, in part by direct statutory prohibitions and in part through delegation of rule-making power to the Commission (Sections 9, 10 and 15(c)(1)); regulation of solicitation of proxies and short term insider trading in the case of issuers having registered securities (Sections 14 and 16); registration and regulation of practices by brokers and dealers effecting transactions on the over-the-counter markets (Section 15); provision for the regulation of associations of brokers and dealers with a measure of self-governing authority subject to Commission supervision (Section 15A); and prescription by the Federal Reserve Board of regulations governing the use of credit in exchange trading (Sections 7 and 8).

The use of the term "registration" may suggest an identity between the Securities Act registration procedure already discussed and registration for various purposes under the Exchange Act. This is not in fact the case. Procedures with respect to the registration of exchanges, registration of securities issues for exchange trading and registration of brokers and dealers present substantive and procedural problems which differ from each other and from the Securities Act registration process. Some of the Exchange Act procedures are ones in which the Commission must weigh conflicting interests of a private party instituting the proceeding and other persons interested in the securities business. An example is an application to accord unlisted trading privileges on one national securities

exchange to a security already listed on some other national securities exchange. Again, there is a possible clash of interests in a rather unique setting, so far as administrative procedures go, in the cases where the Commission entertains applications under paragraphs (g) and (h) of Section 15A (the Maloney Act) for review of denials of membership or disciplinary action taken by a registered association of brokers and dealers.

The Trust Indenture Act, 53 Stat. 114 (1939), 18 U. S. C. A. § 61k and the Investment Advisers Act, 54 Stat. 789 (1940), 15 U. S. C. A. § 80a are simpler in structure than the other statutes administered by the Commission and their procedures are sufficiently related in character to some of the procedures which have been described in other statutes administered by the Commission, so that separate treatment appears to be unnecessary.

* * * *

I hope that these rather inadequate references to the range of procedures administered by the Commission will indicate the variety of contexts in which the Commission must decide what procedures will best subserve both the public interest committed to it under its specific regulatory statutes and the procedural rights of interested parties in the light of the Administrative Procedure Act. I believe that this variety serves to illustrate the wisdom of the draftsmen in not attempting to make the Administrative Procedure Act the kind of a straight jacket which might have resulted from the enactment of some of the earlier bills. I hope I have also made clear that it is the objective of the Commission to live up to the spirit as well as the letter of the Act and to accord, wherever feasible, procedural safeguards which go beyond the minimum requirements of the Administrative Procedure Act.

DISCUSSION PERIOD

FEBRUARY 4, 1947

The Session Convened at 8:00 p.m.

QUESTION: I would like to ask you a question on the subject that you discussed as to whether a registration statement, rather the effective date of a registration statement, is impliedly a license as opposed to the question of what is the effect of a stop order? It seems to me that it is not necessary to say that a registration statement accompanied by an effective date in effect constitutes a license because, as I understand the statute, if it were not for the statute, people could proceed to sell securities without the necessity of registration or anything else as they had prior to the SEC. So that all you are doing there is eliminating that right by stating that it becomes unlawful to sell the security unless you first have filed and then waited a given number of days. Non-action there is merely leaving the people where they were when there was no law rather than to have it constituted either as a decision or a rule or a license.

MR. FOSTER: I think that is true of most regulations of the character which, apart from the terminology in the Act itself, has generally been described as licensing. That is, even a license to build a dam on a navigable river is something you did not have to get one hundred years ago. Or certainly not a license to practice medicine. In other words, certain aspects of the licensing function involve a finding by the regulatory agency that certain statutory standards are met. Under the Securities Act there is no such finding. The only findings the Commission makes are the negative findings that in a particular case something is false and misleading and therefore a stop order should be issued. It never finds that the statement is accurate and not misleading. Whereas, in order to approve an acquisition under the Holding Company Act it has to find affirmatively that the acquisition meets certain public interest standards. That is again something which in my

opinion would ordinarily be referred to as a licensing approval. But under the Administrative Procedure Act it is also something that involves the kind of legislative determination which might make it appropriate to characterize that as rule making of particular applicability, unless you say that everything that involves the granting of permission was intended to be outside the concept of rule making.

QUESTION: But you did not have to grant permission in the first instance. The first time you are called upon to make a decision is when you issue a stop order. Up to that time you sit back and simply say, "Well, you have complied with the law in the sense that you are doing what you always had a right to do in the absence of stepping on our toes or violating the Act."

MR. FOSTER: I tried to make that point—that is the difficulty of treating this process as licensing within the Act's definition. If you disregard the Act's definition and look at a policy to afford certain procedural safeguards where proceedings are of an accusatory nature, then I think that you are dealing with the kind of procedure in which the Commission thinks it is fair to accord the kind of safeguards which the Act makes mandatory in the case of the revocation of a license.

QUESTION: In your opinion does Section 10(e) of the Act create any different scope of review with regard to any of the acts except those that formerly provided that your findings would be conclusive on the facts, whether the evidence was substantial or not?

MR. FOSTER: All I can say there is it contains a lot of words and a lot of potential lawyers' arguments. But I do not think the words are really significant, because I think that within the framework of the existing standards of judicial review, if the courts do not like what the agency is doing, they will find some way to set it aside and if they do, I do not think any of those additional standards mean any more than perhaps that briefs are going to be longer in the future.

THE UNITED STATES PATENT OFFICE AND THE ADMINISTRATIVE PROCEDURE ACT

CASPER W. OOMS

NATURE OF THE FUNCTIONS OF THE PATENT OFFICE

Historical Note.—The United States Patent Office is one of the oldest—if not the oldest—administrative agency with judicial or quasi-judicial functions in the United States Government. It was officially created as the Patent Office¹ in 1836.

Prior to 1836 and since the founding of the Government patents had been granted by the Secretary of State who was, first with the Secretary of War and the Attorney General of the United States,² and later alone,³ authorized to receive and act upon applications for patent.

Since 1836 the Patent Office has been performing substantially the same function which was then assigned to it. This function is the examination of patent applications and the issuing of patents found grantable and the refusal of patents not authorized by law. From time to time throughout the intervening 110 years there have been considerable modifications in the statutes and in the practice and particularly in the selection of the appellate tribunals to review the work of the Patent Office.

It is somewhat unfortunate that in the study of administrative procedure which led to the formulation of the Administrative Procedure Act the work of the Patent Office and its history, and particularly the history of the changes and development in the review of its work, were ignored. In the report of the Committee on Administra-

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¹ Patent Act, 5 Stat. 117 (1836), 2 U. S. C. A. § 105.

² Patent Act, 1 Stat. 109 (1790) repealed, see note 3 *post*.

³ Patent Act, 1 Stat. 318 (1793), 3 U. S. C. A. § 42. Repealed, see note 1 *supra*.

tive Procedure, appointed by the Attorney General, only a footnote of confession is left to report that "the highly specialized character of the Patent Office and the insufficiency of the Committee's staff led first to the postponement and then to abandonment of plans to study this agency."⁴

The conduct of that study, had it been made, would have disclosed that the methods of the Patent Office have to a surprising degree anticipated the problem out of which the Administrative Procedure Act was born.

The Patent Office has consistently provided the applicant before it with a full measure of all of the requisites of process that the Administrative Procedure Act insures, a regularized and publicized procedure, notice, repeated opportunity for hearing, a complete written record of the official proceedings, and full review.

A study of the review offered the disappointed suitor in the Patent Office would also have disclosed that the selection of an appellate tribunal set up to review the work of an administrative agency is not an indifferent matter. For almost a hundred years Congress has altered and experimented with the review of decisions and various special tribunals to conduct that review. A study of the variety of legislative efforts to meet the special need of a reviewing agency adequate to the specialized work of the Patent Office reveals the entire anatomy of administrative review.⁵

Functions of the Patent Office.—The United States Patent Office is entrusted with two rather formidable functions: (1) the examining and granting or refusing of United States patents upon inventions; and (2) the registration of trade-marks. While the practice with respect to these two branches of the law approach each other in

⁴ Administrative Procedure in Government Agencies, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1944) at 4.

⁵ The long and interesting history of the review of the decisions of the Patent Office is treated at length in an article by P. J. Federico, "Evolution of Patent Office Appeals" (1940) XXII Jour. of the Patent Office Society 838, 920, *et seq.*

several respects, there are many substantial procedural differences in the handling of the two types of applications in the Patent Office and the courts, in part due to the differences in the characteristics of the subject matter involved, but more largely due to the accidents of legislation.

This paper will just briefly outline the general applicability of the Act to the Patent Office and the practice with respect to the publication of rules, orders, and records. The applicability of the specific provisions of the Administrative Procedure Act to the operations of the Patent Office can then most easily be measured by a brief review of the functions involved in the handling of respectively a patent application and an application for the registration of a trade-mark, and finally considering the more general functions of the Patent Office which are not directed immediately at either of these services.

General Statement of the Applicability of the Administrative Procedure Act to the Patent Office.—The Commissioner of Patents is empowered

subject to the approval of the Secretary of Commerce, . . . to establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office, . . .⁶

and does make such rules governing the patent examining work of the Office. Under a similar provision in the trade-mark law granting the Commissioner alone power to make trade-mark rules,⁷ appropriate rules for that practice are promulgated. The exercise of these powers raises the question of the applicability of Sections 3 and 4 of the Administrative Procedure Act.

With respect to the adjudications made by the Patent Office, to be treated in detail hereafter, the exemptions specified in Section 5, both with respect to the initial demand that the adjudication be "required by statute to be determined on the record after opportunity for an

⁶ 32 Stat. 830 (1903), 35 U. S. C. A. § 6.

⁷ Lanham Act, 60 Stat. 440 (1946), 15 U. S. C. A. § 1123.

agency hearing" and the exception of "matter subject to subsequent trial of the law and the facts *de novo* in any court," exclude them from the applicability of that section, and consequently Sections 7 and 8. The legislative history shows that "the work of the Patent Office" was intended to be excluded.^{7a}

THE PATENT OFFICE'S COMPLIANCE WITH SECTION 3

The records of the Patent Office must necessarily remain secret (except from the parties concerned) during the prosecution of an application for a patent or for registration of a trade-mark. Nevertheless it is the announced policy of the Office to respect that secrecy only while the application is pending, and thereafter when a patent is issued to make available to the public generally the whole record of every issued patent in the Patent Office.

The Patent Office has complied with the provisions of Section 3(a), and has published in the Federal Register of September 11, 1946, an outline of its general establishment and functions, a description of its organization broken down to divisions, a fairly precise statement of the methods by which its work is handled, and a reference to printed publications which it publishes.

Since 1836 the Patent Office has published some kind of circular of general information as an aid to those who may be interested in its business, and in addition, for the past hundred years the Office has published a rather substantial volume of Rules of Practice in the United States Patent Office. The Patent Office makes these, and a pamphlet copy of relevant statutes, available for free distribution.

Each week since 1872 the Patent Office has published its Official Gazette, reporting its official actions, announcing changes in organization and procedure, detailing the

^{7a} Legislative History, Administrative Procedure Act, Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) at 22.

status of its work, and also reporting a large number of opinions of the Commissioner, the Supreme Court of the United States, the Court of Customs and Patent Appeals, and other courts.

In common with many other agencies, the Patent Office has suffered from the fact that however extensive and precise a set of rules is formulated it must necessarily leave many of the details of its practice unexpressed. This is due not only to the fact that it is impossible to anticipate in any set of rules the great variety of situations which may be presented for application of the rules, but because the practice is necessarily a developing one and a set of rules is therefore constantly in revision. The practice of the Patent Office, to the extent that it has been unstated in the published rules, has been the subject of informal commentary by several practitioners whose manuals are well known in the field.^s

This practice is further implemented from time to time by Commissioner's Orders and Notices to the Examining Staff which have usually been given publication in the Official Gazette of the Patent Office, and in any event are available to the public.

It is recognized that Section 3(a) of the Administrative Procedure Act will require the amplification of the material that is published in the Federal Register, and it is the announced policy of the Patent Office to publish in the Federal Register any modification of its rules or statements of policy or formulated interpretations for the guidance of the public. The Patent Office will, of course, continue to publish the same material in its weekly Official Gazette and, to the extent that the material lends itself to separate compilation and republication in pamphlets

^s Wolcott, *Manual of Patent Office Procedure* (9th ed. 1947); McCrady, *Patent Office Practice* (2d ed. 1946); Rivise and Caesar (2 vol.), *Preparation and Prosecution of Patent Applications* (1940) and *Interference Law and Practice* (1943); Stringham, *Double Patenting* (1933) and *Semiotic of Patent Interference Count* (1941); Stringham and Glasecock, *Patent Soliciting and Examining* (1934).

distributable to the public, to expand the practice now followed of making its rules of procedure and circular of general information generally and freely available.

With respect to the provisions of Sections 3(b) of the Administrative Procedure Act, the Patent Office will continue to publish all of its rules. With respect to its final opinions, those announced by the Board of Appeals and a few by the Commissioner, several problems arise.

The first of these problems is the fact that while the patent application or the trade-mark application remains pending, the adjudication upon it must be held confidential. When the requirement for confidence is lifted by the allowance of the application, the opinions are available to the public. Similarly, when an appeal is taken to the Court of Customs and Patent Appeals in any case the opinion becomes a matter of public record automatically in the records in the court.

A second rather formidable consideration is presented by the problem of publishing the opinions of the Board of Appeals in that the Board is currently passing upon approximately 4,000 appeals a year, and this year, with special statutory aid,⁹ may pass upon as many as 6,000. Obviously, a large number of these decisions are of no legitimate interest to anyone except the party involved in the proceeding. The decisions which are not public are not cited as precedents by the Office as the practice prohibits the citation of any opinion not available for publication.

A large number of opinions are rendered each year in cases in which, frequently as a result of the opinions, the applications are abandoned while in the secret stage. Many of these cases are insubstantial, and it would serve no purpose to publish these opinions, although if an important issue is adequately decided the Commissioner has power to publish the opinion.

⁹ Pub. L. No. 620, 79th Cong., 2d Sess. (1946), 60 Stat., 35 U. S. C. A. § 7.

In view of the fact that few of the opinions are useful as precedents, and in view of the fact that there would be little incentive to adequate indexing to give access to the opinions if they were made available merely by opening the record to the public at the Patent Office, the Patent Office is confronted with the difficult question of determining how best to meet the spirit of Section 3(b). The present practice obviously comes within the letter of the law. Proposals are being reviewed to determine whether or not a procedure shall be adopted for the appraisal of each opinion, to enable the publication of those that have definite precedent value in the Official Gazette of the Patent Office under a system of annotation that will make them generally acceptable and useful.

Section 3(c) of the Act raises the same question as Section 3(b) in that most of the records of the Patent Office are, for the period of the active prosecution of the application within the Patent Office, kept secret except from the parties directly concerned. However, as secrecy is lifted by the granting of the application it has been the practice of the Patent Office to make the entire file available for inspection by the public or for copying at the Patent Office.¹⁰ One of the first resources of the attorney who must appraise an issued patent to determine its scope, its validity, or its possible vulnerability on various statutory grounds, is the so-called file wrapper and contents of the patent application, which is a complete and official record of the entire proceedings of the prosecution of the application.¹¹

PATENT OFFICE RULE-MAKING FUNCTIONS

The rule-making power conferred upon the Commissioner of Patents by the statutes referred to above has to

¹⁰ Minor exceptions, such as those provided for in Patent Office Rule 111 are discouraged.

¹¹ For the importance of this see, e.g., *Exhibit Supply Company v. Ace Patents Corporation*, 315 U. S. 126, 131, 62 Sup. Ct. 513, 86 L. ed. 736 (1942); and cases there cited.

a large extent been exercised only in response to a growing practice. The public has always participated to some extent. A Patent Office Advisory Committee composed of a number of leading patent attorneys and business men has long existed, and the Office has vigorously solicited recommendations from the profession. In some instances proposed rules have been informally circulated among representative practitioners for comment.

It is extremely doubtful whether any of the rules formulated to govern either patent or trade-mark practice are other than "interpretative rules, general statements of policy, . . . procedure, or practice," and since there is no statutory requirement for notice or hearing, Section 4(a) is not applicable. However, the Patent Office, which is now engaged upon a revision of its rules both in trade-mark and patent practice, has outlined a program for public participation that will more than meet the requirements of the Act. This is the program:

The program of revision has been announced. Suggestions have been invited. Existing committees of various bar associations, patent law associations, and trade associations have been asked to formulate suggested rules and forms. Meetings have been held with the participating groups. Meanwhile, with this guidance, the Patent Office has its own internal committee at work upon the project, combing all suggestions from within and without the office, including the critical literature in the field.

When a tentative draft has been prepared of either the complete book of rules, or a substantial portion thereof, this will be announced in the Federal Register, the Official Gazette of the Patent Office, and in other media, and the draft widely distributed. At the same time opportunity will be given for the submission of written views, arguments, suggestions, etc.; and oral hearings are also contemplated. Thereafter the final draft of the rules will be prepared and published, effective at a date at least thirty days thereafter (unless an emergency requires an earlier

effective date), and full publicity will be given to this decision.

With respect to amendment of any rule now in effect and those being drafted, a procedure is being established to announce the proposed rule with equal publicity.

This practice is upon trial. It will doubtless meet every requirement of those who practice before the Office, but wherever it is found deficient it will be studied and modified in the light of the experience under the Act.

ADJUDICATION FUNCTIONS OF THE PATENT OFFICE

Section 5 of the Administrative Procedure Act has very limited application to the Patent Office, because with a single exception, none of its adjudications are "required by statute to be determined on the record after opportunity for an agency hearing." In addition, with but unusual exceptions, every adjudication by the Patent Office is "subject to subsequent trial of the law and the facts *de novo* in" a court. Nevertheless, the Patent Office practice measures up to the solicitude which the Administrative Procedure Act evinces for full notice and hearing, and separation of the advocacy from the judicial functions in the process of adjudication. Separately examined these proceedings disclose a full compliance with the objectives of the Act, and for the most part more than one hundred years of successful experience with the practice exempted from Sections 5, 7 and 8.

The Administrative Practice with Respect to Patents.—By far the larger part of the effort of the Patent Office is devoted to the examination of applications for patent. These are all made under the provisions of the Patent Act, which is in general the compilation made in the Revised Statutes in 1874 and the numerous amendments that have been made from time to time to those statutes, now reported as Title 35 of the United States Code.¹²

¹² Sections 1-72.

The Patent Act defines the types of subject matter upon which patents may be procured and the statutory barriers against which an application must be tested, and imposes upon the Patent Office the duty of making an examination of the application.

To obtain a patent, an inventor must file an application in the Patent Office. This application accompanied by a government filing fee includes a complete description of the invention, claims defining the invention and its scope, a drawing of the invention if possible, and an oath of inventorship by the inventor, and must comply with various requirements. When its turn is reached, this application is examined. The examiner studies the application, both the technical and legal aspects, and makes a search through all relevant prior United States patents and also through prior foreign patents and publications, for material anticipating the invention. A decision is reached on the patentability of the invention or the claims presented from the study and the results of the search and this decision, including formal matters and requirements, communicated to the applicant. If the action is adverse, the applicant may request reconsideration, amending this application and presenting any arguments and evidence he desires. The application is examined again, and further reconsiderations are possible. Informal oral hearings (interviews) are common, although all transactions are required to be in writing. The volume of work may be appreciated from the fact that over 90,000 applications for patent were submitted in 1946, and more than 200,000 are in various stages of prosecution at the present time.

The law provides an appellate tribunal within the Patent Office, the Board of Appeals, to which any applicant whose application has been twice rejected may appeal.¹³ From the Board of Appeals the applicant may appeal to the Court of Customs and Patent Appeals¹⁴ or assert the

¹³ 44 Stat. 1336 (1927), U. S. C. A. § 57.

¹⁴ 44 Stat. 1336 (1927), 35 U. S. C. A. § 59(a).

alternative remedy of an original action in the United States District Court against the Commissioner of Patents in which the right to the patent may be tried anew.¹⁵

Formal objections and requirements raised by the examiner as well as procedural matters are reviewable by the Commissioner on petition. Petitions of this type and petitions with respect to other matters such as to take cases up out of turn, to revive abandoned applications, to pay final fees late, to amend after allowance, etc., were taken in over 4,000 cases in 1946.

In none of these provisions is any requirement for a hearing imposed except as it may be implied in the language which provides for a review within the Patent Office by the Board of Appeals which states that "each appeal shall be heard by at least three members of the Board of Appeals."¹⁶

In practice the Patent Office not only grants an oral hearing within this tribunal but grants ample opportunities for oral interviews at the earlier stages of the prosecution of the application.¹⁷

Interference Practice.—One feature of the patent practice that rarely occurs in any similar form in other fields of the law is the collision of two applicants for the same patent, an eventuality called an interference. The law merely requires in such a case that the applicants be notified of the interference and the board of three interference examiners be directed "to proceed to determine the question of priority of invention."¹⁸ In this interference proceeding, the conflicting subject matter is defined by issues or "counts" by the examiner; the parties are notified, and given an opportunity to object to the proceeding or to reformulate it by striking out or adding to the issues or in other ways. Testimony is then taken by depositions and the determination is ordinarily an award of priority

¹⁵ 27 Stat. 436 (1893), 35 U. S. C. A. § 63.

¹⁶ 44 Stat. 1338 (1927), 35 U. S. C. A. § 7.

¹⁷ Rules of Practice in the United States Patent Office, Rules 151, and 13.

¹⁸ 44 Stat. 1336 (1927), 35 U. S. C. A. § 52.

resulting in the grant of a patent to the winning party and a refusal to the losing party. This determination is also reviewable by direct appeal to the Court of Customs and Patent Appeals,¹⁹ or in the alternative at the election of either party by civil action brought in the District Court of the United States.²⁰

Public Use Proceedings.—In addition to the direct conduct of the prosecution of the patent application and the conduct of an interference to determine priority between two colliding applicants, the Patent Office practice presents a number of subsidiary activities bearing upon the prosecuting of the application.

The first of these is called a public use proceeding. This proceeding has no basis in the statute other than in its general terms, which prohibit the patenting of any invention which has gone into public use or on sale in this country more than one year prior to the filing of the application.²¹

The rules²² of the Patent Office have, however, established a procedure for the initiation and conduct of a proceeding of this character which, like every other determination in the Patent Office is accompanied by notice, a full opportunity for eliciting all relevant evidence and a final hearing on the merits. In addition the proceeding is not instituted without a preliminary hearing of all affected parties on the issue of whether the proceeding should be instituted.

The final determination in the public use proceeding is a rejection of the application which is attended by the same review which is available upon a final rejection of the application on any other ground.

We turn now to the first of the adjudications for which no trial *de novo* in the Courts is available and therefore

¹⁹ 44 Stat. 1336 (1927), 35 U. S. C. A. § 59(a).

²⁰ 27 Stat. 436 (1893), 35 U. S. C. A. § 63.

²¹ 29 Stat. 692 (1897), 35 U. S. C. A. § 31.

²² Rule 11.

present questions of the applicability of Sections 5, 7 and 8.

Proceedings to Strike Application.—Another proceeding which is only infrequently invoked in the Patent Office is one covered by no express provision of the statute and no present rule of the Patent Office. It is the practice of striking an application for some fundamental obstacle to its further prosecution, such as fraud upon the Patent Office²³ or violation of the statutory prohibition against prosecution of an application owned by an employee of the Patent Office.²⁴

This procedure is usually initiated by the service upon the applicant of a rule to show cause within a fixed period why the application should not be stricken from the files for grounds which are specifically and fully set forth in the rule.

The applicant is given an ample opportunity to make response and an opportunity to be heard at length by either the Commissioner of Patents or an Assistant Commissioner.

The submission of this issue to the Commissioner is required by the practical fact that the Primary Examiner, who ordinarily makes the adjudication upon a patent application and whose decision is reviewable by the Board of Appeals, has no facilities for eliciting facts which do not appear in the patent application and the documents offered in support thereof, and the further fact that ordinarily the extraordinary character of the questions raised in these cases requires determination by the head of the agency.

Since the statute contains no provisions for either a trial *de novo* or any type of statutory review of this proceeding, it is obviously one that falls directly within the embrace of Section 10 of the Administrative Procedure Act.

²³ Ex parte Mallard, 593 O. G. 143, 71 USPQ 294; and cases there cited. Compare Federal Communications Commission v. WOKO, U. S., 67 Sup. Ct. 213, 91 L. ed. 190 (1946).

²⁴ 16 Stat. 200 (1870), 35 U. S. C. A. § 4.

Inasmuch as this procedure is not one required by statute to be determined on the record after opportunity for an agency hearing, Section 5 is not applicable. As no subsequent trial *de novo* is provided for, the Patent Office treats this procedure in every respect as if it were covered by Sections 5, 7 and 8, assigning the investigating and prosecuting duties to the office of the Solicitor and confining the hearing responsibility to the agency in the person of the Commissioner or an Assistant Commissioner.

The hearing and adjudication are conducted in the same manner as the disbarment proceeding, next to be discussed.

Disbarment Proceedings.—In all the activity of the Patent Office there is only one provision within the statute which expressly confers upon an interested party the “opportunity for a hearing.” This provision is found in the section of the law which confers on the Commissioner of Patents the power to prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing applicants before the United States Patent Office, and grants the Commissioner of Patents the power “after notice and opportunity for a hearing” to “suspend or exclude, either generally or in any particular case, from further practice before his office any person found to be guilty of disreputable or gross misconduct” or other violations prescribed in the statute.²⁵

The statute prescribes a specific review of an order of disbarment in the District Court of the United States for the District of Columbia, subject to its proceedings and rules.²⁶

This disbarment proceeding, it is clear, falls directly within the provisions of Section 5. Compliance with the provisions of 5(a) and 5(b) are easy. Section 5(c) is observed by the simple precaution of having the Solicitor of the Patent Office perform the investigative and prosecuting function, except where special counsel are engaged,

²⁵ 32 Stat. 830 (1903), 35 U. S. C. A. § 11.

²⁶ See *Hatch, et al., v. Coms.*, decided Jan. 23, 1947 (D. C. D. C.).

and having the Commissioner or an Assistant Commissioner, attended by professional members of the staff, conduct the hearing. Thus, the agency itself conducts the hearing and compliance with Section 7(a) is met, and at the same time Section 8(a) becomes inapplicable. This procedure is obviously practicable only because of the infrequency of the proceedings brought for disbarment.

The Patent Office in all proceedings has adhered to the practices prescribed in Sections 7(c) and 7(d). To the extent that Section 8(b) is applicable, as it is in disbarment proceedings, the only change in the current practice will be the insistence of the Office that the respondent file proposed findings, or be given a fixed opportunity to argue exceptions to the findings tentatively made by the hearing agency, or both.

Ex Parte Trade-Mark Practice.—The functions of the Patent Office with respect to the registration of trade-marks were generally set forth in the Trade-Mark Act of 1905²⁷ and the Trade-Mark Act of 1920²⁸ in various amendatory acts and subordinate statutes. These statutes have been substantially supplanted by the so-called Trade-Mark Act of 1946, more familiarly known as the Lanham Act.²⁹ Inasmuch as the Lanham Act becomes effective on July 5, 1947, and is in most procedural respects correspondent with the previous statutes, only the 1946 Act will be treated in considering the applicability of the Administrative Procedure Act.³⁰

An application for the registration of a trade-mark is presented to the Patent Office in the same manner as a patent application. The application is examined by an expert skilled in the particular cases assigned. This expert

²⁷ 33 Stat. 724 (1905), 15 U. S. C. A. §§ 81-109.

²⁸ 41 Stat. 533 (1930), 15 U. S. C. A. §§ 121-128.

²⁹ 60 Stat. 427 (1946), 15 U. S. C. A. § 1051.

³⁰ The Rules for Trade-Mark Practice under this act are now being drafted. The procedure herein discussed is largely that prescribed by the current rules, but the minimal procedural devices herein discussed will be substantially retained in the practice.

is available for oral interview, makes his action upon the application a matter of written record of which the applicant is furnished a copy, and his final action is subject to appeal to the Commissioner of Patents.³¹

Inter Partes Trade-Mark Practice.—In addition to the normal *ex parte* application for the registration of a trade-mark the Act provides for four kinds of adversary proceedings:

The first of these is the opposition proceeding which is instituted after the allowability of an application has been indicated and the proposed trade-mark has been published in the Official Gazette of the Patent Office³² for the purpose of eliciting opposition, which may be instituted by a notice of opposition.³³ Upon the filing of an answer this proceeding is submitted to an examiner of interferences who receives such testimony as the parties have reduced to depositions, briefs, and oral arguments.³⁴

Where the opportunity for opposition is not availed of, a party may, within the time limits fixed by the Act, institute a cancellation proceeding against a mark that has passed to registration.³⁵ Proceedings in this case are much like those of an opposition and heard before the same officer in the same manner. The statutory grounds for decision differ somewhat. In certain prescribed situations the Federal Trade Commission may institute the cancellation proceedings.³⁶

A third possible conflict is an interference proceeding involving the collision of two applicants for the registration of substantially the same trade-mark or the interference of a pending application with a registered mark.³⁷ The same procedure for determining this controversy is provided for.

³¹ See note 30 *supra*, § 20.

³² Section 12.

³³ Section 13.

³⁴ Section 17.

³⁵ Section 14.

³⁶ Section 14.

³⁷ Section 16.

The fourth procedure of an adversary character is an entirely new procedure first expressed in the Lanham Act which provides for the concurrent registration of the same mark by two different businesses using the same mark in distinguishable areas.³⁸ The statute provides for a "hearing" of this type of controversy and it is expected that the hearings will be conducted in somewhat the same manner as that provided for in other *inter partes* proceedings.

From the decision of the examiner in interferences in each of these four types of proceedings the appeal is to the Commissioner of Patents or an Assistant Commissioner acting in his place.³⁹

From the decision of the Commissioner of Patents the appeal in both *ex parte* and contested cases is to the Court of Customs and Patent Appeals, or in the alternative a review can be had by an action under R. S. 4915, (35 U. S. C. 63).⁴⁰

Paralleling the practice which has developed in the Patent Office of recognizing a procedure to strike an application where the applicant resorts to fraud in its prosecution, it is expected that provision will be made in the new rules for the service of a rule to show cause, upon hearing, why an application should not be stricken upon the grounds precisely stated in the rule. If that procedure is adopted, it will be a procedure for which the statute contains no express review, and accordingly the situation will be one which invokes the applicability of Section 10 of the Administrative Procedure Act. Insofar as the practice within the Patent Office is concerned, the discussion above with respect to the corresponding practice to strike a patent application is completely explanatory.

JUDICIAL REVIEW OF PATENT OFFICE ADJUDICATIONS

From what has been said in review of the various types

³⁸ Section 2(d).

³⁹ Section 20.

⁴⁰ See note 30 *supra*, § 21.

of adjudications made by the Patent Office it is clear that statutory review is provided for every normal type of adjudication except those committed to agency discretion. An optional trial *de novo* is available under the Patent statute for each final adjudication refusing a patent or trade-mark. That remedy is not provided for in a disbarment case.

A study of the decisions of the appellate tribunals within which these adjudications have been reviewed discloses a recognition of each of the principles expressed in Section 10 of the Act.

Review may not be available under statutes other than the Administrative Procedure Act in interlocutory matters, matters decided by the Commissioner on petition, and in extraordinary situations, such as striking an application for fraud which has been referred to. Interlocutory matters are apparently not subject to separate review, but many of them may, as in the past, be reviewable with adjudications on the merits both in the Office and on appeal. The remedy of mandamus or equivalent review has been available in appropriate cases.⁴¹

It is expected, of course, that the enactment of Section 10 will have the effect of minimizing the technical aspects of the review and its availability, and that the courts will welcome the appellant as exercising a right of review and not merely treat him as a suppliant for extraordinary remedy. Thus will the substantial purposes of the Administrative Procedure Act be served.

DISCUSSION PERIOD

FEBRUARY 5, 1947

The Session Convened at 3:30 p.m.

QUESTION: My question is whether any examiners such as called for in Section 11 will be provided for in the Patent Office?

⁴¹ *Steinmetz v. Allen*, 192 U. S. 543, 563, 24 Sup. Ct. 416, 48 L. ed. 555 (1904). Levy, "Mandamus in Patent Office Proceedings" (1936) XVIII Jour. of the Patent Office Society, 307, 439, 546 *et seq.*

MR. OOMS: No. Under the other provisions of the Act, the only types of adjudication in the Patent Office that do not fall within the exceptions expressed in Section 5(a) are the few I have referred to, the disbarment proceedings and the motions to strike. Those all raise unusual questions which frequently involve a fundamental question of policy or statutory construction and they are so infrequently invoked that the Patent Office will be able to handle those as an agency hearing conducted by the Commissioner or by an Assistant Commissioner and under those provisions of the law it will be unnecessary to have hearing examiners as provided for in Section 11.

QUESTION: Then there will be no change in the present Board of Appeals?

MR. OOMS: No. The Board of Appeals will continue to exercise its statutory function.

QUESTION: Will the primary examiners continue to sit on the Board of Appeals?

MR. OOMS: The primary examiners will sit on the Board of Appeals only for the three years of emergency expressed in the special statute enacted last year to provide for the primary examiners sitting on the Board to relieve the current backlog. It is expected that as soon as that backlog is discharged, the primary examiners will no longer sit on the Board of Appeals. However, the procedure before the Board remains identical with what it was before the primary examiners sat on the Board and, of course, the review available to anybody, appealing from the Board of Appeals, or in the alternative proceeding to review by way of a trial *de novo* in the District Court is such that the practice is exempted from Sections 5(a), 7(a), and 8.

QUESTION: There are certain decisions made by you which have the nature of finality on petitions made to you. Is there going to be any provision made in the Patent Office to review those decisions?

MR. OOMS: Would you give me one type?

QUESTION: Well, a petition, say, to revive.

MR. OOMS: A petition to revive is committed to the discretion of the Commissioner. The only review available under the Administrative Procedure Act will be by way of a proceeding in the nature of a mandamus, although it will probably no longer be called such, which will, of course, give relief only where the discretion had been abused. I think the statute makes it clear, and the interpretations within the committee and in the discussion of the statute on the floor make it clear that it was never intended to substitute for the discretion of the agency, the discretion of a court that might subsequently hear the case on a procedure in the nature of a writ of mandamus. But there are a large number of other interlocutory proceedings in the office, such as petitions for supervisory discretion which, of course, have no review, although they will be and many of them are reviewable on the merits in the Board of Appeals and, of course, this review may be followed by the statutory review either in the Court of Customs and Patents Appeals or under Section 4915. But I see no substantial change in the procedure as it is now being conducted. The most that can be said is that we will absolutely modify the procedure in disbarment cases and the procedure in cases where the rule is issued to strike the application for some fundamental reason. We will modify that. And then I see also an enlargement of the liberality of the review which was formerly available in the nature of a mandamus proceeding.

QUESTION: Commissioner, what is the effect of this Act upon the ability of the Patent Office to lay down special requirements, technical requirements, for attorneys practicing before it?

MR. OOMS: That is covered in Section 6, which was not suggested for discussion at the Institute. Nevertheless, it

is an interesting question. The statute left it entirely up to each agency to determine what persons it would recognize to practice before it. Of course, the statute still insists that every party practicing on his own behalf before the agency may appear there without counsel; also may be accompanied by counsel and then, finally, that the agency itself may recognize a special class of practitioners qualified to practice before it. You know that in the history of this Act, several attempts were made to enlarge the opportunity to practice but the authors of the Act also recognized, and I think it is expressly stated, in some of the hearings, that the qualifications for work in the Patent Office were such that they could not very well open that work to laymen generally. I expect to see no change in the practice in the Patent Office in the manner of admission of practitioners before it with respect to patents.

With respect to trade-marks, there has been no substantial rule. For all practical purposes, everybody is practicing there and in the formulation of the new trade-mark rules we will set down definite criteria of who may appear there. It is contemplated at the present time that that practice will be limited to attorneys at law and agents recognized and registered in the Patent Office, to practice before the Patent Office.

QUESTION: You may have covered this in your talk, you touched on it a bit. But at the present time are there any confidential instructions going out to the examiners that are not available to the public?

Mr. Ooms: I think there is nothing in the way of confidential instructions. I have been working for a year and a half trying to find out just what the hierarchy of instructions were that we issued in the office. We have notices to examiners, we have orders. We try to publish everything that has any bearing upon the practice. With respect to personnel practice and things of that kind, there are instructions that are naturally of no interest to the public.

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QUESTION: I mean instructions regarding action on cases in general.

MR. OOMS: I do not think there are any that are confidential at all. Although we probably are not required to publish those in the Federal Register, we publish in the Gazette everything we can think of that alters in any way the practice of the practitioner. The statute does not expressly require it with respect to the Patent Office because of the very broad exemptions, inasmuch as most of our rules are procedural or formulations of policy expressed in the statute. We are setting up a procedure by which every order which has any bearing upon the practice will be published both in the Gazette and in the Federal Register.

QUESTION: Would interpretations of rules be so published?

MR. OOMS: Interpretations of what kind?

QUESTION: That is, general interpretations of the rules of practice, say.

MR. OOMS: I think they will be published if there is anything sufficiently broad as not to be applied to just a single case. I contemplate that ultimately—how quickly I do not know—certainly as soon as we can get our new rule book promulgated, we will publish an official manual of practice rather than the unofficial manuals that have heretofore been in use, so that a man will have a guide book that he knows is binding upon him and the office. We expect to begin our trade-mark practice immediately upon the formulation of those rules in the same way. We will publish, I think, far more than merely procedural rules. We will publish some interpretations.

QUESTION: You mean concerning McCrady, something like that?

MR. OOMS: Yes. With respect to manuals of practice, McCrady is typical, and Wolcott's Manual. But what I

am thinking of is that our rules in the trade-mark practice will probably include some types of interpretative rulings, interpretative regulations, such as you find for instance in the publication of the rules of the Food and Drug Administration. There is plenty of room for that under the new trade-mark law.

QUESTION: Mr. Commissioner, perhaps because I came in late I am not entirely clear as to whether the Federal Administrative Procedure Act has added new judicial remedies for actions in the Patent Office to those which existed before it was enacted. Has it done so?

MR. OOMS: I do not think it has. Under the decision in *Steinmetz v. Allen*, 192 U. S. 543, the Supreme Court recognized that mandamus procedure was available to control any action of the Patent Office that did not fall within the class of appealable adjudications? Now, under Section 10, I think you are assured that that remedy is available by statute. But I think it will be approximately the same remedy that was available under the decision in *Steinmetz v. Allen*, and that the courts have long respected in practically all types of procedure where you have no appeal. I think there is no enlargement of the actual appeal that is available. There now is an express declaration that it is available. I think that is the net effect of the Act.

QUESTION: In pending trade-mark oppositions or cancellations, the Patent Office has on occasion not permitted equitable defenses. They felt they were not relevant to the proceeding. Does Section 10(e) of the rules change that in any way?

MR. OOMS: Whether it does or does not, the section of the Lanham Act that is applicable guarantees you those equities.

QUESTION: I was thinking of Section 10(e) prior to the effective date of the Lanham Act.

Mr. Ooms: I see no express provision there that would guarantee the availability of those unless you find it in Clause 4, "without observance of procedure required by law." Which one do you have in mind?

QUESTION: Well, it might be "otherwise not in accordance with law" under B(1).

Mr. Ooms: Under that I assume that the only governing law there would be the trade-mark statute itself, and if the trade-mark statute did not recognize an equitable defense of any kind, that this would not guarantee a reversal on that ground, but under the new Lanham Act I think you are assured those defenses.

Our practice has been enlarged somewhat by our recognition that the Federal Rules of Civil Procedure are applicable wherever we had no express rule governing it and I think the Federal Rules of Civil Procedure insure that you may interpose an equitable defense in appropriate cases. So that I would say if the issue were raised today we would decide that equitable defense is available, but we would do so without recourse to the Administrative Procedure Act.

QUESTION: Did I understand you to say at the outset that in your opinion this Act was not intended to apply to the Patent Office? Perhaps I misunderstood you.

Mr. Ooms: That has been expressed at various times in earlier drafts of the legislation. As the Act is now drawn it does apply to the Patent Office in the few respects I have enumerated. That is, we are not expressly excluded as we were in one of the earlier drafts. But all of the studies shook us off. They took one look at the Patent Office and said they did not want to get into there, that it was too complex. It is unfortunate, because if one studies that very interesting development of review beyond the Patent Office, of Patent Office adjudications, starting back in 1836 and sees it change from year to year you have

some appreciation of the fact that the problem of review of administrative decisions is not new.

I think it started even before 1836. You first had just lay arbitrators who could be summoned by the Secretary of State to review the cases. They were paid for by the appellant who, I think, paid a fee of \$25, and the arbitrators were paid \$10 for an adjudication of the case. They found it so difficult to get those lay arbitrators that they began to establish other methods of review, first by appeal to the Chief Justice of the District Court of the District of Columbia, then to any Justice of the Court. That left it up to the appellant to pick his own judge. If he found one more favorable than the other, he went to the judge he thought more favorable. The statute also provided for payment of a fee to the judge, with the result that one judge found it a very profitable business and regularly reversed the Patent Office to insure that he would have a monopoly of the review business. The Chief Justice felt he was getting too much work and asked that the law be enlarged to permit other justices to do the same work, but most lawyers liked the Chief Justice so well that they refused to take their cases to the other judges.

Almost every type of experience with administrative review is included in the history of the legislation governing reviews of Patent Office adjudications, and these have been missed in this study of administrative review which led to the passage of this Act. But Mr. Federico's articles on this (see footnote 5, above) are a very interesting history of the whole development.

THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE IMMIGRATION AND NATURALIZATION SERVICE

UGO CARUSI

At the outset I should like to express my appreciation for the opportunity of participating in this Institute on the Federal Administrative Procedure Act. Dean Vanderbilt and his associates in this enterprise are performing a valuable service to the Bar, the administrative agencies, the courts, and Congress in making possible such a comprehensive survey of this important statute in action. We who have the privilege of taking part in these discussions are bound to profit through an exchange of ideas and an expansion of perspective.

The Administrative Procedure Act has been on the statute books since June 11, 1946, a period of less than eight months. That is little enough time in the life of any law, but in relation to a statute of such tremendous sweep the elapsed time hardly can be said to have approached the threshold of real enforcement. This far-reaching legislation has undertaken the unprecedented task of attempting to fit the diverse procedures of all federal agencies into one mould. Whether Congress has succeeded in accomplishing that project will be determined by the exacting tests of time and experience.

All of us who have had the opportunity of examining the Administrative Procedure Act know that in many respects it is a statute of great complexity. Indeed, this phenomenon was inevitable in the light of the ambitious program envisaged by Congress. In seeking to govern the procedure of all federal agencies Congress necessarily used language of sweeping generality. To some the Act appears to abound in ambiguous phrases and exceptions.

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You who are practicing lawyers may have found it possible to view the obscurities of the statute with equanimity. You undoubtedly felt that in time the language of the statute would be clarified by court decisions, as cases arose, or by legislative revisions. But those of us who are entrusted with the job of law enforcement could not wait for judicial interpretations or legislative revisions. It was our responsibility to be ready to administer the law when it became effective. The effective date was fixed for September 11, 1946, except for the provisions relating to hearings and decisions, which became effective December 11, 1946, and those relating to the appointment of examiners, which will become effective June 11, 1947. Within the brief allotted period it was incumbent upon us to re-examine our procedures, to make any revisions required by the new statute, and to draft and effectuate additional regulations. I can assure you that there were divisions of opinion among us as to the proper interpretation of some phases of the statute. However, we ultimately made a number of determinations formulating policies which are now being executed. Perhaps some of those determinations are wrong, but they represent our best judgment after considering the language and purpose of this legislation. From past experience I am certain that our brethren who practice in immigration and nationality cases will have no hesitancy in questioning any of our rulings with which they may disagree.

ORGANIZATION AND FUNCTIONS OF THE IMMIGRATION AND NATURALIZATION SERVICE

Before embarking upon a consideration of specific problems under the Administrative Procedure Act, I believe it well to outline briefly the nature and scope of our activities. The Immigration and Naturalization Service is the agency charged with enforcement of the immigration and nationality laws of the United States. Administrative responsibilities under those laws extend back for many years. In the field of immigration regulation they stem

from the Act of August 3, 1882, 22 Stat. 214 (repealed), which was the initial federal immigration law of general application. Supervision over immigration originally was the responsibility of the Secretary of the Treasury. Later it was transferred to the dominion of the Secretary of Commerce and Labor and then to the Secretary of Labor. Since June 1940 it has been entrusted to the Attorney General. Administrative supervision over naturalization was inaugurated by the Act of June 29, 1906, 34 Stat. 596, 8 U. S. C. A. § 351. So it is quite clear that we in the Immigration and Naturalization Service certainly are not newcomers in the field of administrative law.

Enforcement of the immigration laws has invested us with two major phases of authority. The first relates to passing upon the admissibility of persons who desire to enter the United States. Those who seek entry may be aliens, citizens, or non-citizen nationals of the United States; they may be diplomatic representatives of foreign governments, officials of our own Government, business men, tourists, or immigrants; they may come on foot, by automobile, train, vessel, or plane; they may request admission for a few hours, weeks, months, or for permanent residence. In every case their qualifications and credentials must be inspected by officers of the Immigration and Naturalization Service, who determine whether they are entitled, under the applicable laws and regulations, to enter or reenter the United States.

It is our job also to execute the deportation laws of the United States. Under the mandate of those statutes we are directed to expel from the United States aliens who entered this country unlawfully and those who are guilty of certain types of misconduct in the United States after a proper entry.

In the field of naturalization we are charged with complete administrative supervision over the naturalization process. It is our job to receive all naturalization applications, to interrogate the applicants and their witnesses, to

make all necessary investigations, and in each case to make reports and recommendations to the naturalization courts.

These three principal facets of our work manifestly involve responsibilities of the highest importance. We deal with the personal rights and status of hundreds of thousands of individuals each year. Our job involves policing the borders, making investigations, detaining those under custody in deportation proceedings, and rendering large numbers of adjudications.

To do this job the Immigration and Naturalization Service has about seven thousand officers and employees, stationed at points throughout the continental United States, and in Alaska, Hawaii, Puerto Rico, the Virgin Islands. We even have a few officers in Canada, and recently some have been on temporary detail in Europe and in the Pacific Islands. The Immigration and Naturalization Service is an arm of the Department of Justice. As Commissioner I am directly responsible for the administration of the Immigration and Nationality laws, and I perform my duties under the direction of the Attorney General. The officers and employees of the Service function through a Central Office, which has been temporarily situated in Philadelphia for the past five years, and sixteen district directors to each of whom is assigned administrative accountability for specific areas.

It is patent that the Immigration and Naturalization Service is an "agency," as defined in Sec. 2(a) of the Administrative Procedure Act. I shall now consider the extent to which specific provisions of that statute apply to us.

PUBLIC INFORMATION

A reading of the Congressional debates and Committee reports indicates quite clearly that Congress placed heavy emphasis upon the public information sections of the statute. One of the principal complaints to which this legislation is addressed was the frequent assertion that the pro-

cedures, policies, and decisions of many administrative agencies were not sufficiently available to the general public and to the legal profession. I suppose most of us would have to acknowledge some fault in this respect, although frequently the omissions were attributable to causes beyond our control. Now that Congress has established a positive policy, it is incumbent on all administrative agencies to make certain that their procedures comply with the legislative mandate.

Section 3(a) of the Administrative Procedure Act requires every agency to publish in the Federal Register detailed statements as to its organization, procedures, and its substantive rules and interpretations. Existing agencies were required to formulate and publish this information by September 11, 1946, when the Act became effective. In common with all other agencies the Immigration and Naturalization Service conformed with the directive of Congress and our formulations appeared at pages 177A—110 to 114 in the voluminous Federal Register of September 11, 1946. It was our belief that previous publications had disclosed substantially all the desired information concerning our organization, procedures, and policies. However, we published a full statement along the lines indicated in the statute. And we shall, of course, supplement that statement from time to time as revisions are needed. A complete compilation, entitled "Immigration and Nationality Laws and Regulations" has been prepared by us for some years. That book, together with its annual supplements, may be obtained from the Government Printing Office. A loose-leaf edition of this publication, containing current revisions and amendments, is available for examination at any office of the Immigration and Naturalization Service.

Section 3(b) requires every agency to publish or make available its final opinions or orders. I must confess that the facilities of the Immigration and Naturalization Service in this regard heretofore were not satisfactory. Until now there has been no provision for making administrative deci-

sions of this Service and the Board of Immigration Appeals available to the public and the Bar. We were conscious of the need for official published reports of our decisions and for over a year we have been working on plans for such a publication. But other projects we considered more urgent have caused us to defer completion of those plans.

However, I must mention the Monthly Review of the Immigration and Naturalization Service, a printed publication we have issued since July, 1943. This magazine may be obtained at the nominal cost of \$1.00 annually, and in it we have attempted to convey information concerning our operations, policies and determinations, as well as digests of important decisions. We intend to continue rendering that service. While this periodical does not furnish the complete reports of actual decisions, to which lawyers are accustomed, it endeavors to present a current picture of important Service activities.

After passage of the Administrative Procedure Act the plans for publishing our decisions were accelerated. The result has been the inauguration of the new publication, "Administrative Decisions under Immigration and Nationality Laws." Volume 1, which will be over 1,000 pages long is now in final proof and should be obtainable from the Government Printing Office in the near future. Volume 2 is in preparation and should be issued later in the year. Thereafter additional volumes will be distributed on a current basis. The decisions in these volumes may be cited as precedents, but they are not necessarily to be regarded as binding upon subsequent administrative decisions.

There may be a few cases in which our determinations are deemed confidential. Under the express reservations of the Act the opinions and orders in such cases will not be published and will not be cited as precedents.

The remaining provision relating to public information is Section 3(e), which deals with records. Official records that are not confidential may be made available "to persons properly and directly concerned." This language makes

it clear that the records will not be opened to busybodies or to individuals venturing upon fishing expeditions. Only persons demonstrating a reasonable and legitimate need may have access to such records.

Under a policy enforced for many years all records of the Department of Justice have been regarded as confidential. That policy was proclaimed by the Department's Order No. 3229, issued by the Attorney General on May 2, 1939, and formulated under the authority of Revised Statutes, Sec. 161, which now is codified in Title 5 of the United States Code, Section 22, and the case of *Boske v. Comingore*, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. ed. 846 (1900). It is the Attorney General's view that the Administrative Procedure Act did not change existing law and practice as to materials in Government files heretofore treated as confidential. Therefore our regulations under the Administrative Procedure Act provide, 8 Code of Fed. Reg. 1.80,¹ that officers and employees of the Immigration and Naturalization Service may not permit the disclosure or use of information in the official records except upon authorization of the Attorney General, an Assistant Attorney General, or the Commissioner of Immigration and Naturalization acting for the Attorney General. Such disclosure or use may be permitted in particular cases or through a regulation of general applicability. It should be pointed out also that by the specific command of the Alien Registration Act of 1940, registration and fingerprint records made under that Act are secret and confidential and may be made available only to persons or agencies designated by the Commissioner of Immigration and Naturalization with the approval of the Attorney General. 54 Stat. 674 (1940), 8 U. S. C. A. § 455.

Our action in response to court subpoenas is consistent with these policies. Whenever a subpoena *duces tecum* to produce any official records is served on an officer of the Immigration and Naturalization Service, that officer is in-

¹ For similar provision in the Regulations issued by the Department of Justice see 28 Code of Fed. Reg. 51.71.

structed, unless expressly authorized by the Attorney General or the Commissioner of Immigration and Naturalization, to appear in court and respectfully decline to produce the specified records, on the ground that the disclosure of such records is prohibited by outstanding regulations.

Of course, during the time a case is pending before the Service the person involved, and his attorney or representative of record, is permitted to review the file, and in exclusion or expulsion proceedings may be lent a copy of the testimony and the findings of the presiding inspector or the Board of Special Inquiry.

It is our policy to permit disclosure and use of information from the records of the Immigration and Naturalization Service only when such action is necessary to promote the ends of justice and will not be detrimental to the interests of the Government. Requests from Federal, State, and local government agencies and such quasi-official agencies as the American Red Cross ordinarily meet these tests and such requests usually are honored. When the information is solicited by private organizations or individuals other than the subject of the record we take into consideration the interests of the person affected, the interest of the person seeking the record, and the interest of the Government. Our determination in each case will depend on its own facts.

A brief outline of some factual situations that have recently confronted us may help to illustrate our policy. One case arose out of the collision between two vessels in an Eastern port. Both vessels were sailing without lights, under wartime regulations. As the result of the collision one of the ships sank immediately, with the loss of all hands aboard, and left no trace as to its identity. However, the body of an officer of the ship was washed ashore near the scene of the wreck. In the resulting litigation request was made for the production of the immigration record showing departure of the shipwrecked vessel, as one link in the chain of proof that it was the boat sunk in the acci-

dent. The Government was not involved in the litigation. We concluded that the ends of justice would be served by granting the request to produce the record.

In another case the defendant in an action on a life insurance policy sought permission to use our official records to prove that the deceased person had falsified his age. We granted that application, too, and held that no interest of the Government was offended by disclosure of the official record to aid in the determination whether fraud had been practiced. It is our view that the ends of justice generally are served by full disclosure when a claim of fraud is involved.

On the other hand, an attorney recently requested production of our records in a suit to contest the will of his client's father. We were obliged to deny that request because no public interest seemed to be involved. This ruling was in line with our general policy to deny requests for disclosure of our records in private litigation, unless justice cannot be done without the production of such records. Similarly, we decline to furnish information to persons, other than the subject of the record, who desire to use the information for personal reasons not affecting the public interest. These include, for example, bill collectors, "skip tracers," and private investigators.

RULE-MAKING

The process of rule-making does not occupy an important place in the activities of the Immigration and Naturalization Service. Our job is primarily one of administration and enforcement. Various statutes confer upon the Commissioner of Immigration and Naturalization complete authority to issue needed rules and regulations. But the rule-making function is merely ancillary to the primary task of law enforcement. Therefore the provisions of the Administrative Procedure Act concerning rule-making are not of major importance in relation to our work.

The immigration and nationality laws contain no

requirement for advance notice or hearings in the formulation of rules and regulations. Consequently, under the specific direction of Section 4(b) of the Administrative Procedure Act the adjudicative formulas listed in Sections 7, 8, and 11 of that Act have no place in our rule making. And Section 4(a) excludes any requirement that advance notice be given by us of proposed regulations other than those which are substantive. Since the bulk of our regulations relate to statements of procedure, policy, interpretation and other matter designated by the statute itself as non-substantive, we have had little occasion thus far to give notice of proposed rule-making in the Federal Register.

Rules and Regulations under the immigration and nationality laws are drafted by the Commissioner of Immigration and Naturalization with the assistance of his staff. When the drafts are completed they are submitted to the Attorney General for his approval. Upon approval of the Attorney General they are filed with the Division of the Federal Register of the National Archives for publication in the Federal Register.² Regulations dealing with the Immigration and Naturalization Service appear in Title 8 of the Code of Federal Regulations. Since September 11, 1946, such regulations are stated separately by type and content, in conformity with Section 3(a) of the Administrative Procedure Act.

We have not as yet received any petitions from interested persons for the issuance, amendment, or repeal of a rule, under Section 4(d) of the Act. Such petitions should be submitted to the Commissioner of Immigration and Naturalization and the revisions they propose will receive full consideration. The petitioner will be notified in due course concerning any action taken upon his petition.

ADJUDICATION

Among the most important provisions of the Adminis-

² See 49 Stat. 580 (1935), 44 U. S. C. A. §§ 301-314; 1 Code of Fed. Reg. (Cum. Supp. 1943) Part 2.

trative Procedure Act are those affecting administrative adjudications. The interpretation and application of those provisions in relation to the functions of the Immigration and Naturalization Service has been the topic of prolonged discussions within the service, with officials of the Department of Justice, and with the Attorney General himself. There was some divergence of views, but the end result was the promulgation of a number of policies. As I have said, these determinations represent our best judgment at this time.

In assessing the effect of the Administrative Procedure Act upon the operations of the Service, I shall consider the three principal adjudicative processes with which we are concerned. There are proceedings relating to: (1) the admission or exclusion of persons seeking to enter the United States; (2) the deportation of aliens who are improperly within the United States; and (3) admission to American citizenship.

Entry into United States.—There is an organization of Service officers which issued a publication named "The Guardian at the Gate." That title in large measure describes the major responsibilities of the Immigration and Naturalization Service in relation to persons who seek entry into the United States. It is the function of the Department of State to consider initially through its Consular officers in foreign countries the applications of aliens who seek to come to this country and to issue immigration visas, within the established quotas, to those who appear qualified. Ours is the ultimate function, on the other hand, of passing upon the admissibility under our laws of aliens who apply for admission at the land borders and coast ports of the United States. We must determine whether such applicants for admission are in possession of the documents required by law and whether they meet the physical, mental, moral, literacy, financial and other prescribed qualitative requirements. Since several hundred thousand aliens enter or reenter our ports each year and

since there are over one hundred grounds for exclusion specified in the immigration laws, it is evident that the guardian at the gate has a responsibility that is quite exacting.

Over the course of the years a simple and effective procedure has been evolved to administer the immigration laws and to safeguard the rights of persons who seek to enter the United States. This procedure is sufficiently flexible to satisfy the needs of persons who arrive in vessels at our seaports, those who apply for entry at a "land border port," and the steadily increasing stream of plane passengers arriving at our airports. And although the immigration laws refer only to aliens, it is clear that immigration officers have full authority to pass upon the claims of persons who apply for entry alleging that they are citizens of the United States. Such authority is a necessary incident of immigration law enforcement, since otherwise ineligible persons could gain entry by the simple expedient of claiming that they are citizens.³

The first step in the determination of admissibility to the United States is interrogation of the applicant by an immigrant inspector. Such interrogation is known as the primary inspection, and it is necessarily expeditious and informal. The immigrant inspector questions the applicant, examines his documents, and makes a determination as to his status and his admissibility to the United States. If his determination is favorable, as it is in the great majority of cases, the applicant is permitted to enter the United States. In such cases the statute does not provide for a hearing, and in practice there is neither a formal hearing nor is any record made of the testimony. The immigrant inspector's decision ordinarily closes the case.⁴

However, if the primary inspector is not clearly satisfied beyond a doubt that the applicant for admission

³ *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. ed. 917; (1904); *United States v. Ju Toy*, 198 U. S. 253; 25 Sup. Ct. 644, 49 L. ed. (1905).

⁴ 39 Stat. 885-886 (1917), 8 U. S. C. A. §§ 151-152.

is entitled to enter the United States, he must detain the applicant and refer his case to a Board of Special Inquiry. The primary inspector is not authorized to exclude any person seeking to enter the United States. Such action can be taken only by a Board of Special Inquiry or by the Attorney General, or officials designated to act for him.

The Board of Special Inquiry is a device that has been provided by law since 1893.⁵ The present statute⁶ empowers the Commissioner of Immigration and Naturalization or the Inspector in Charge at the various ports of arrival to appoint as many such Boards as may be necessary for the prompt determination of the claims of applicants for entry detained at such ports. Each Board consists of three members, all of them officers of the Service except that in special cases at isolated ports the Attorney General may determine it practicable to designate Government officials or other persons to serve on such Boards. The statute requires that a complete and permanent record be kept of proceedings before the Board. The alien or a dissenting member of the Board may challenge adverse decisions by appeal to the Attorney General. Unless reversed on appeal by the Attorney General, or officials designated to act for him, the decision of a Board of Special Inquiry adverse to the alien is final.⁷

Under the present practice the Attorney General's authority in deciding appeals from determinations of Boards of Special Inquiry usually is exercised by the Commissioner of Immigration and Naturalization and the Board of Immigration Appeals.⁸ The latter is a non-statutory board which has been created by the Attorney General. Such appeals are considered in the first instance by the Commissioner. If the Commissioner's decision is favorable to the alien, his decision is final. However, if the Commissioner recommends affirmance of the excluding

⁵ 27 Stat. 569 (1893), 8 U. S. C. A. § 172.

⁶ 39 Stat. 887 (1917), 8 U. S. C. A. § 153.

⁷ *Ibid.*

⁸ 8 Code of Fed. Reg. 90.1, 90.2.

decision of a Board of Special Inquiry, the matter is referred to the Board of Immigration Appeals for further consideration. Any conflict between the Commissioner and the Board of Immigration Appeals can be referred to the Attorney General for final disposition.⁹ The Attorney General also considers any case in which a dissent has been recorded, or in which the Board certifies that a question of difficulty is involved, or in which he himself directs reference of the case to him.¹⁰

From the foregoing description it seems clear, in my opinion, that the Administrative Procedure Act was not intended to be fully applicable to entry proceedings. In the first place, it is patent that the immigration statutes envision a simple, expeditious process. An alien seeking to enter the United States is entitled to a fair hearing, but the Supreme Court has recognized that such a hearing necessarily may be quite summary in form.¹¹ In passing upon the qualifications of hundreds of passengers arriving on a great liner, or thousands of motorists passing a busy land border inspection station, or dozens of plane passengers eager to be off to their destinations, the inquiry must be swift. An excess of formality has no place in such a proceeding.

Secondly, the immigration statutes make no provision for a formal hearing or the creation of a record in entry proceedings, except with respect to proceedings before a Board of Special Inquiry.

Finally, even with respect to proceedings before a Board of Special Inquiry the immigration statutes do not appear to have contemplated the adjudicative procedures prescribed in the Administrative Procedure Act. In my opinion Congress intended that the Board of Special Inquiry was to continue the investigation commenced by the primary inspector. There is no room for the separation

⁹ 8 Code of Fed. Reg. 90.3.

¹⁰ 8 Code of Fed. Reg. 90.12.

¹¹ *Chin Yow v. United States*, 208 U. S. 28 Sup. Ct. 201, 52 L. ed. 369 (1904).

of functions in such a pattern of inquiry. In addition, by express statutory direction the proceedings of the Board of Special Inquiry must be separate and apart from the public.¹² The alien is permitted to have one friend or relative present, but until now it has been held that he was not entitled to representation and participation by counsel in the proceedings before a Board of Special Inquiry.¹³ Only upon appeal from the decision of a Board of Special Inquiry does the statute recognize a right to representation by counsel.¹⁴

After careful evaluation of these considerations in the light of the language and purpose of the Administrative Procedure Act, we arrived at three principal conclusions. First, hearings will continue to be conducted by the Boards of Special Inquiry, since they are within the saving clause of Section 7(a) continuing "Boards . . . specifically provided for or designated by statute." Second, such proceedings will be regarded as "determining applications for initial licenses." Thus, Board of Special Inquiry hearings will be subject generally to the provisions of Sections 5, 7, and 8 of the Administrative Procedure Act, but will be regarded as exempt from the separation of functions requirements of Section 5(c). The makeup of the Boards and their freedom to consult informally with other persons and agencies will continue as heretofore. Findings of fact, of course, will continue to be based on material made a part of the record upon timely notice to the alien. Third, aliens will be permitted counsel in proceedings before Boards of Special Inquiry.

To implement these determinations we adopted new regulations which appeared in the Federal Register of December 11, 1946, 11 Fed. Reg. 14232. These have intro-

¹² See note 6 *supra*.

¹³ *Brownlow v. Miers*, 28 F. 2d 653 (C. C. A. 5th, 1928); *Chaam v. Commissioner*, 41 F. (2d) 526 (D. C. S. D. N. Y., 1930).

¹⁴ See note 4 *supra*; 8 Code of Fed. Reg. 136. For regulations governing admission of attorneys and representatives to practice before the Service and the Board of Immigration Appeals see 8 Code of Fed. Reg. 95.

duced the following innovations. The examining inspector who detains an alien for hearing before a Board of Special Inquiry will thereupon deliver to the alien a written notice informing him of the nature of and reason for such action, and of his right to counsel before the Board. At the hearing the Board of Special Inquiry will advise the alien of his right to representation by counsel and will give him a reasonable time to arrange such representation. The Board of Special Inquiry will examine witnesses for the Government, introduce evidence, cross-examine the alien's witnesses, and rule upon objections. The alien's counsel may participate by examining and cross-examining witnesses, offering evidence, and making objections. At the time of announcing its decision the Board of Special Inquiry will make a brief statement for the record of the findings of fact and conclusions of law upon which its decision rests. Written notice of the decision will be promptly sent to any counsel of record and to the alien. In the event the alien appeals from an adverse decision a transcript of the record of proceedings and a full statement of the findings of fact and conclusions of law will be made. A copy of that record will be sent to the alien or his counsel and they will be allowed a reasonable time to file exceptions to the decision and a brief.

In many respects these revisions represent a marked departure from our former procedure. We believe they comply substantially with the Administrative Procedure Act, when that statute is measured against the requirements of the immigration laws. It is too early yet to appraise their effect upon our operations, but it seems safe to predict that they will place increased burdens upon the Service personnel. During the fiscal year 1946 there were about 8,300 hearings before Boards of Special Inquiry, from which approximately 950 appeals arose. And as world transportation improves, the number of such hearings and appeals unquestionably will increase. The new procedure thus will be tested under the most exacting conditions.

Deportation proceedings.—The immigration laws invest the Attorney General with complete authority to deport aliens found in the United States in violation of law.¹⁵ The deportation process is thus entirely administrative. It extends to aliens whose original entry was unlawful and to others who have been guilty of certain types of misconduct after they commenced to reside in the United States.

Deportation is a very serious affair, since it may result in the separation of a person from his home, family and friends. The Supreme Court has pointed out that deportation may result in the loss "of all that makes life worth living."¹⁶ We in the Department of Justice and the Immigration and Naturalization Service have fully appreciated the gravity of our task and have endeavored to conduct deportation proceedings in conformity with high standards of fair play. I have no hesitancy in admitting that at various times in the past our Service has been subjected to criticism in connection with the deportation process. In large measure I believe such criticisms were occasioned by the stern necessities of the deportation laws. We have sought, however, to profit from such criticism, from our own experience in administration and from the admonitions of the courts. It should be noted that the deportation statutes, unlike the legislation dealing with entry, make no provision for a hearing. But we have developed a procedural pattern over the course of the years which in my opinion scrupulously safeguards the rights of the alien and adheres to generally accepted standards of fair dealing and due process. It may be of some significance that the Attorney General's Committee on Administrative Procedure a few years ago scanned our deportation process, but did not find it necessary to suggest any revisions.

The deportation proceeding is commenced by the issuance of a warrant of arrest by the Attorney General or an

¹⁵ 39 Stat. 889 (1917), 8 U. S. C. A. § 155.

¹⁶ Brandeis, J., in *Ng Fung Ho v. White*, 259 U. S. 276, 284, 42 Sup. Ct. 492; 66 L. ed. 938 (1922).

officer designated by him. Such a warrant is not issued unless it is determined that sufficient evidence has been developed to establish a *prima facie* case for deportation.¹⁷ The warrant is then served upon the alien, and he is taken into custody by immigration officers, who advise him of the cause for his arrest and furnish him with a copy of the warrant. He is thereupon advised of his right to representation by counsel and ordinarily he may be released on bond pending final disposition of his case.¹⁸

The alien is then granted a hearing before an immigrant inspector, known as the "presiding inspector." That officer may not be the immigrant inspector who conducted the original investigation, unless the alien consents. In some cases an additional officer may be assigned as the "examining inspector," but it generally has not been possible to assign such additional officer in the majority of cases. The presiding inspector rules on objections, and in cases where no examining inspector has been assigned, he examines and cross examines witnesses and presents evidence. At the outset of the hearing he informs the alien of the charges against him, advises him of his right to representation by counsel and of any remedial benefits to which he may be entitled. The alien or his counsel may examine and cross-examine witnesses, offer evidence, and make objections.¹⁹

The presiding inspector does not make a decision in the deportation proceedings; his function is to recommend proposed action. After the hearing is concluded he prepares a memorandum setting forth a summary of the evidence, his proposed findings of fact and conclusions of law, and a proposed order. Copies of these are furnished to the alien or his counsel, and they may file exceptions and a brief.²⁰ Then the entire record is forwarded to the Central Office for a determination thereon by the Commissioner.²¹ Upon

¹⁷ 8 Code of Fed. Reg. 150.3.

¹⁸ 8 Code of Fed. Reg. 150.4, 150.5.

¹⁹ 8 Code of Fed. Reg. 150.6.

²⁰ 8 Code of Fed. Reg. 150.7.

²¹ 8 Code of Fed. Reg. 150.9.

request, the alien or his counsel may be given an opportunity for further argument in the Central Office.

A decision then is made by the Commissioner, or by designated officials of the Central Office, acting for him. If the Commissioner rules against deportation, that determination usually closes the case. However, if the Commissioner concludes that deportation should be ordered, the case is referred to the Board of Immigration Appeals for further consideration. The Board also may permit oral argument upon application. If the Board's conclusions conflict with those of the Commissioner, the case may be certified to the Attorney General for final decision,²² upon the Commissioner's request.

It seems to me that this procedure complies with virtually every requirement of the Administrative Procedure Act. The only variance is that in most cases there is not a complete separation of functions, since the presiding inspector generally conducts the entire hearing and recommends the decision. The safeguards provided under our present procedure certainly will be retained and extended. So that the only issue at the present time is whether the Administrative Procedure Act commands us immediately to invoke a complete separation of functions in deportation proceedings.

Section 5 of the Administrative Procedure Act imposes its requirements only in cases "of adjudication required by statute to be determined after opportunity for agency hearing." There never has been any statutory direction that hearings be held in deportation cases. Such hearings have been prescribed as the result of administrative experience and the requirements proclaimed by court decisions. If the Administrative Procedure Act purported to govern hearings "required by law," we would consider ourselves bound by its provisions. But it is highly significant that such language was used in an earlier draft of the legislation, but was modified in the final draft so as to refer

²² 8 Code of Fed. Reg. 90.3, 90.5.

only to hearings "required by statute." Examination of the legislative history convinced us that this modification was deliberate and that the Act was designed to regulate only cases where the statute requires a hearing for the creation of a record upon which a determination is made.²³ Therefore it was the unanimous opinion of all of us that the Administrative Procedure Act did not control deportation proceedings.

While it was our conclusion that we are not required to apply the Administrative Procedure Act to deportation proceedings, it was also the conviction of all of us, on the other hand, that it is desirable to conform whenever possible with the provisions of that Act. Therefore, it will be our policy hereafter to conduct deportation proceedings in conformity with the requirements of the Administrative Procedure Act, insofar as it is possible to do so within our limitations of budget and personnel.

Naturalization Proceedings.—The Immigration and Naturalization Service has a very important function in the naturalization process. As I have already pointed out, it is our job to exercise administrative supervision over that process, to conduct all necessary investigations, to interrogate applicants and their witnesses, to appear in court on behalf of the Government and to make recommendations to the naturalization courts. However, naturalization is essentially a judicial function. The ultimate responsibility for passing upon petitions for citizenship is entrusted to the courts.²⁴ Our assignment is to assist and to advise the courts in the discharge of that responsibility. Consequently, the explicit reservations in Section 5 of the Administrative Procedure Act make its provisions inapplicable to naturalization proceedings.

²³ See Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) p. 7; H. Rep. No. 1980, 79th Cong., 1st Sess. (1945) p. 3; Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945) p. 40; 92 Cong. Rec. 5756 (May 24, 1946).

²⁴ Nationality Act of 1940, 54 Stat. 1140, 8 U. S. C. A. § 701(a); *Tutun v. United States*, 270 U. S. 568, 46 Sup. Ct. 425, 70 L. ed. 738 (1926); *Hohm-gren v. United States*, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. ed. 861 (1910).

JUDICIAL REVIEW

Since naturalization is a judicial function, there is ample opportunity to review a naturalization judgment by appeal to a higher court.²⁵ Therefore naturalization applications do not present any particular problem in this connection.

Immigration proceedings, on the other hand, are entirely administrative. The immigration statutes expressly direct that the Attorney General's order of deportation²⁶ and the decision ordering that an alien be excluded from entering the United States²⁷ shall be "final." However, in deportation cases, and to a lesser extent perhaps in exclusion proceedings,²⁸ the courts have insisted upon observance of the Constitutional requirements of due process.²⁹ The courts have ruled that a failure to observe such requirements may be questioned in a habeas corpus proceedings.

The writ of habeas corpus is thus a collateral challenge, rather than a direct review, of the administrative action. It will be entertained only when the petitioner has exhausted any administrative remedies that are available to him.³⁰ And the courts have ruled that they will intervene in immigration proceedings only upon a showing of "error so flagrant as to convince the courts of the essential unfairness of the trial."³¹ The cases in which habeas corpus proceedings have been sustained generally have fallen into one of three principle categories.

1. The order of deporation was not supported by substantial evidence.³² This does not mean, of course, that

²⁵ *Tutun v. United States*, *supra*.

²⁶ See note 15 *supra*.

²⁷ See note 6 *supra*.

²⁸ See *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. ed. 369 (1908); *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. ed. 1040 (1905).

²⁹ U. S. Constitution, Fifth Amendment.

³⁰ *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. ed. 917 (1904).

³¹ *Vajtauer v. Commissioner*, 273 U. S. 103, 106, 47 Sup. Ct. 302, 71 L. ed. 560 (1927).

³² *Bridges v. Wixon*, 326 U. S. 135, 65 Sup. Ct. 1443, 89 L. ed. 2103 (1945).

the courts will intervene merely upon a claim that the findings of fact were wrong,³³ or that evidence was received which was not admissible in a judicial proceeding.³⁴ The administrative determinations on questions of fact will not be disturbed if they are supported by substantial evidence.

2. The Attorney General's order was not within the scope of his legal authority.³⁵ As a corollary to this principle the courts have held that since alienage is a prerequisite to the power to deport, a person under deportation proceedings who advances a substantial claim that he is an American citizen is entitled to a hearing *de novo* on such a claim. If the court's finding is favorable to the petitioner, the Attorney General's jurisdiction is ended.³⁶

3. The petitioner was not accorded a fair hearing. The courts have insisted that the hearing conform with "the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the constitution."³⁷

It will readily be observed that the formulas developed by the courts in passing upon habeas corpus applications which seek to review orders in immigration proceedings resemble quite closely the principles applied in reviewing the determinations of other agencies. Indeed, an examination of Section 10 of the Administrative Procedure Act discloses that similar formulations are incorporated in that section. In approving the Administrative Proce-

³³ *Tisi v. Tod*, 264 U. S. 109, 133, 44 Sup. Ct. 274, 68 L. ed. 582 (1924).

³⁴ *Vajtauer v. Commissioner*, *supra*; *Bilokumsky v. Tod*, 263 U. S. 149, 157, 44 Sup. Ct. 54, 68 L. ed. 221 (1923).

³⁵ *Gegiow v. Uhl*, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. ed. 114 (1915); *Mahler v. Eby*, 264 U. S. 32, 44 Sup. Ct. 283, 68 L. ed. 549 (1924).

³⁶ *Ng Fung Ho v. White*, 259 U. S. 276, 42 Sup. Ct. 492, 66 L. ed. 938 (1922). But since the Constitutional guarantee of due process does not necessarily extend to persons outside the United States, the Supreme Court has held that it will not review administrative determinations on citizenship claims in such cases. *United States v. Ju Toy*, see note 28 *supra*.

³⁷ *The Japanese Immigrant Case*, 189 U. S. 86, 100, 23 Sup. Ct. 611, 47 L. ed. 721 (1903); *Kwock Jan Fat v. White*, 253 U. S. 454, 464, 40 Sup. Ct. 566, 64 L. ed. 1010 (1920); *Chin Yow v. United States*, see note 28 *supra*.

cedure Act the Attorney General expressed the opinion that Section 10 merely restated and codified the existing case law on judicial review.³⁸ I believe that this conclusion is abundantly justified with respect to immigration proceedings and it is my opinion that Section 10 will effect no appreciable change in the principles governing the judicial review of such proceedings.

CONCLUSION

In this brief discussion I have attempted to describe the major procedures of the Immigration and Naturalization Service and to explain our interpretations as to the impact of the Administrative Procedure Act upon those procedures. Perhaps the discussions of this Institute may indicate to us that some of our determinations were wrong. Perhaps the need for some revisions may be dictated by our own experience in administration or by controlling court decisions. I can assure you that we shall continue to be receptive to any suggestions for change that will aid us in achieving more effective administration and in fulfilling the mandate of Congress.

DISCUSSION PERIOD

FEBRUARY 5, 1947

The Session Convened at 4:45 p.m.

QUESTION: You may have covered this, Commissioner, but how does the Act cover judicial review of exclusion cases?

MR. CARUSI: The only way we can figure it out is that the Act cannot be much more than confirmatory of our present practice: I refer to the court's insistence on habeas corpus. Where an attempt has been made to use injunc-

³⁸ Sen. Rep. No. 752, 79th Cong., 1st Sess. (1946) p. 43. See also Reich, "The Federal Administrative Procedure Act" (1946) 8 Fed. Bar Jour. 19.

tions or some of the other procedures generally available in the courts to review administrative determinations, the court has said, "No. Habeas corpus is a long recognized method of testing deportation and exclusion processes and that's what you must resort to." I think it will fall right back to our present habeas corpus requirement. There are, of course, special actions like testing citizenship, as you know, by a special act which is in the nature of a declaratory judgment process and things of that sort. But our experience has been, ever since this Act has gone into effect, that where they have tried to use means other than habeas corpus in an ordinary exclusion or deportation case, the court has told them to try again.

QUESTION: When habeas corpus is not available, for example, when a person who had entered under a visa and then left desired to claim the right to come in under a non-quota visa, say, but who had not obtained a proper re-entry permit, would not the decision rest with the Department of State as to whether or not he could re-enter?

MR. CARUSI: That is correct. There has been some suggestion made lately in the interest of economy and efficiency and also in the interest of the alien, that immigration inspections be conducted abroad so that a man would not make a useless trip needlessly. In this connection we have been giving some thought to the advisability of foreign examination of a prospective immigrant because of the fact that the judicial protection which would come to him if he were here and were being detained would be denied him. Of course, our courts have no jurisdiction over there.

QUESTION: The practice has been if there was any doubt in the mind of the Consul, to raise some question on the visa and have it tried out when he came over.

MR. CARUSI: That has been the fact.

QUESTION: I do not know if I heard correctly, but did

you mention the fact that in deportation proceedings there is an oral argument in the central office?

MR. CARUSI: It will be granted on request.

QUESTION: It will be? It is not the present practice, though, is it?

MR. CARUSI: Yes. I mean by that it is not provided for in any rule, but it is done every day. It is another one of these informal things I was talking about. I give what I do not call hearings, but they amount to the same thing, constantly, even over the telephone.

QUESTION: I also wanted to make sure I had the right impression. You feel that the exclusion proceeding is within Section 5, except as to separation of functions coming within the licensing exception?

MR. CARUSI: The way we put it is this: We have doubt that it is intended to come within Section 5, although the strict language of it says that functions or agencies which by statute are required to give a hearing are included. Now, the strict language of the statute says that there shall be a hearing before the Board of Special Inquiry so that in that technical sense it does come within the Act. On the other hand because it is a continuation of this original procedure, call it licensing, or call it inspection, or call it investigation, we doubt that as a practical matter it could be brought within the full terms of the Act, particularly as it relates to separation. What we are doing is trying to give to that process all the aspects of the hearing contemplated by the Act, except that of separation of activity.

QUESTION: Commissioner, you have indicated that you are now preparing two volumes, for the time being, of final decisions for publication. I assume that they will be made available to the public and counsel.

MR. CARUSI: That is to say they will be on sale at the Government Printing Office.

QUESTION: Do they include the final decisions of the Commissioner as well as those of the Board of Appeals?

MR. CARUSI: I was talking to Carl McFarland to get his advice. He felt that all that was required was to make available those decisions which could be used as precedents by the bar or the alien, and certainly that we ourselves used as precedents. In other words, we could not use a decision as a precedent and not let you know about it. In other words, we do not publish all opinions by the Commissioner because, in the first place, many of them do not become final. The Board of Immigration Appeals may disagree with them. In the second place, a lot of them are just cumulative and repetitious and would serve no purpose except to clutter up the books. But the useful ones are not to be excluded, because they may be valuable.

QUESTION: I understand there is certain information and material available to examiners in the service for their adjudication of cases, to wit, manuals and various operations, instructions and matters of that nature. I was just wondering if any of that material will in any way be available to the public.

MR. CARUSI: Yes. As I have said, they are now available at any of our offices and as to that, I may add, we have gone through our operations instructions very carefully to determine which parts of them or which of their provisions come so closely to being what you may call procedural regulations as to justify their inclusion in the regular regulations, so that they in turn will be published in the Federal Register. We have pulled a good deal of material out of what heretofore has been a purely internal document and we shall continue to be very watchful of that hereafter. But as I say the remainder of it which is

still in the manual is available only to us and to our examiners.

QUESTION: Do I understand those manuals are confidential, just for service use, the immigration manual and nationality manual?

MR. CARUSI: There is nothing *sub rosa* or secret about the manual in the sense that we have got special rules that we invoke that we do not let you know about. There is nothing of that sort. It is confidential only because we think it is of no practical use to the public, or it is something that is for internal guidance and I do not think the general public wants anything that is for purely internal management and guidance. In other words, as I say, if it affects the procedure or the determination of a case, certainly you are interested, and that portion of it, at least, ought to be made available to you.

IMPACT OF THE FEDERAL ADMINISTRATIVE
PROCEDURE ACT ON THE PROCEDURES
OF THE INTERSTATE COMMERCE
COMMISSION

C. A. MILLER

After I had accepted Dean Vanderbilt's invitation to participate in this Institute, I received the formal announcement of it. When I looked over the list of distinguished speakers preceding and following me, I thought, perhaps, I had made a mistake in accepting the invitation. After all, I am just a practitioner before the Interstate Commerce Commission, and can give you only a practitioner's view of the subject.

I regret I could not attend the previous sessions, and that I shall not be able to be here the remainder of the week. I would have profited much, in addition to the pleasure I would have in learning many things about this subject that I do not know.

The Interstate Commerce Commission, as you know, is generally regarded as being the oldest of the federal administrative agencies, as we understand that term today. The Commission was created by the Interstate Commerce Act, which was approved February 4, 1887 (24 Stat. 379, 49 U. S. C. A. §§ 1-23, 25-27). You will note, therefore, that it has been in existence for just about 60 years.

The original Act provided for a Commission of five members, to be nominated by the President and confirmed by the Senate. Its membership was increased to seven members by the Hepburn Act of June 29, 1906 (34 Stat. 584, 49 U. S. C. A. §§ 1, 6, 11, 14-16, 18, 20, 41), to nine members by the Commission Division Act of August 9, 1917, and to eleven members, its present membership, by the Transportation Act of 1920 (41 Stat. 590, 49 U. S. C. A. § 75). The law has always provided that not more than a mere majority of the Commissioners may be from the same political party.

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The terms of Commissioners are seven years, and a Commissioner may continue in office until his successor is appointed and qualified.

The Commission was created to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there has been such discrimination, preference, prejudice, or other act, as to be a violation of the Interstate Commerce Act, or any of the auxiliary acts administered by the Commission.

For forty years the Courts have referred to the Commission as "a tribunal appointed by the law and informed by experience."¹ The Commission is, primarily, an arm of Congress. The great bulk of the Commission's work is legislative in nature, coming within the general category of "rule-making," rather than "adjudication." Some of its functions are analogous to the so-called "licensing" functions of the Federal Communications Commission and similar agencies.

The Commission now regulates the railroads, motor carriers, water carriers, and freight forwarders. As to each of these agencies of transportation, the Commission controls almost everything they do. It not only regulates the rates and charges for the transportation services rendered, but it issues certificates of public convenience and necessity for acquisitions and abandonments. It controls consolidations and other forms of unification. It regulates the issuance of securities, the furnishing of cars, safety devices, accounting, and many other phases of activity, the details of which are too many to describe.

In some matters the Commission acts as an entirety. However, as to most subjects, the Commission acts by Divisions. It now has five Divisions. Generally speaking, each Division is composed of three members. With five Divisions and eleven Commissioners, you can readily see that

¹ *Illinois Central R. Co. v. ICC*, 206 U. S. 441, 454, 27 Sup. Ct. 700, 51 L. ed. 1128 (1907).

there is some overlapping of assignments. Some Commissioners serve on more than one Division. Division 5 is known as the Motor Carrier Division. Division 4 is the Finance Division. Divisions 2 and 3 are generally referred to as Rate Divisions. Division 1 is basically administrative.

Each Commissioner supervises certain of the Commission's Bureaus, so far as procedural and similar matters are concerned. Also, special duties are assigned to individual Commissioners from time to time.

The Commission has many bureaus. The principal ones are Motor Carriers, Traffic, Law, Inquiry, Informal Cases, Finance, Accounts, Valuation, Transport Economics and Statistics, Formal Cases, Safety, Locomotive Inspection, Service, Water Carriers and Freight Forwarders, and Personnel.

No attempt has been made to describe the Commission, its activities, or its organization, in detail. The attempt has been made to give a broad outline, in the hope that the foundation will be sufficient for an understanding of what is to be said later.

I happen to have been a liaison member of the committee that revised the Interstate Commerce Commission's "General Rules of Practice," in 1942. I have just recently been named as such a member of the Committee to again revise them, in the light of the requirements of the Administrative Procedure Act. This last appointment came "as a reward for my sin in having had something to do with the passage of the Administrative Procedure Act," to quote from Commissioner Aitchison at the time he suggested that I be included on the new committee. My part in connection with the passage of this act, as a member of the American Bar Association's Special Committee on Administrative Law, was not such as to give me any special knowledge of the subject. In view of these facts, and of the position I hold, I think I should tell you that the views I express are my own, and are not to be considered as

being the views of any of the organizations with which I am now, or have been, connected.

I, also, reserve the right to change my mind as to any of the problems presented by the Administrative Procedure Act, to the extent that further study and consideration makes that seem desirable, as it undoubtedly will. I do not want to be forever bound by what I say here. I remember all too well the lament of Job—"Oh! that mine adversary had written a book."

I remember so well the address of Dean Vanderbilt as president of the American Bar Association in 1938,² the Report of the A. B. A. Special Committee on Administrative Law in that year;³ and his very interesting article entitled, "The Place of the Administrative Tribunal in Our Legal System," in the American Bar Association Journal for that year.⁴ As I said on another occasion, in that year, it seemed necessary to the welfare of mankind that we be saved from these administrative agencies.

It was in the next year, 1939, that the abortive attempt to "pack" the Supreme Court, and subsequent events, diverted attention from these administrative agencies. It was in that year that our own dearly beloved Frank Hogan, in his address as President of the American Bar Association,⁵ said:

Reliance against the exercise of arbitrary power must be placed by the people henceforth in the legislative rather than in the judicial department of the National Government.

Mr. Hogan knew, as we all knew, that there was no hope of insulation against the exercise of arbitrary power by administrative agencies, as a result of self-imposed limitations. The Supreme Court of the United States, and many of the lower federal courts, could no longer be depended upon to save us from arbitrary action by these

² (1938) 63 A. B. A. Rep. 693.

³ (1938) 63 A. B. A. Rep. 331.

⁴ (1938) 24 A. B. A. Jour. 267.

⁵ (1939) 25 A. B. A. Jour. 629.

administrative agencies. When our own United States Court of Appeals for the District of Columbia attempted to curb these agencies, the Supreme Court of the United States would reverse it, and give the agency full authority to go merrily on its sinful ways. Thus the legislature, or the Congress, proved to be the bulwark of our liberties and our saviour, at least in part, from the arbitrary actions of the administrative agencies.

The procedure before the Interstate Commerce Commission was not then much criticized—even though there was, quite naturally, some criticism of the Commission's conclusions and actions in particular cases. While the Interstate Commerce Commission still stands pre-eminent as an administrative agency, and one's esteem for it increases when it is compared with many another such agency, it has not grown in stature during the last decade. It is not its rules of procedure that have been under fire. The rules as written are one thing. The administration of the rules is something else.

The basic principle of all of the Commission's "General Rules of Practice" is to accord a full and fair hearing. One of the actual fundamentals of a "full and fair hearing" is considerate and courteous treatment of counsel and witnesses by the hearing officer, whether he be a Commissioner, an Examiner, or any other person. When the hearing officer fails to accord that consideration and courtesy, that he himself is entitled to, then the hearing becomes arbitrary, but generally not in the sense that the courts would and do use that term, i.e., legally arbitrary.

Oral argument is frequently an essential ingredient of a full and fair hearing. Yet, when the Commission allows only about one-fourth to one-half the time he deems necessary for an adequate presentation of his client's case, and then most of the allotted time is taken away from him by Commissioners' questions, frequently used as a sounding-board for the expression of views, and which, so far as relevant, would be answered by counsel's own argument,

there is a denial of a full and fair hearing, as a matter of fact, but not, at least in most cases, a denial in the legal sense of the word.

These two not infrequent, and sometimes flagrant, examples are cited for the purpose of pointing out to you that the best possible rules of practice, and the best possible statutes, do not, as a matter of fact, always assure a fair hearing.

I still adhere to my oft-expressed views, heretical though they be, that we have a government of men and not a government of laws, and that the men who sit as members of the Commission are of more importance than its rules of procedure. So far back as 1914, the Senate Committee on Interstate Commerce said:

It is of paramount importance that men of the first order of ability should be attracted to these positions.⁶

"For the law is naught but words save as the law is administered," said the then Chief Justice Hughes.⁷

Senator Pat McCarran, the distinguished co-author of the Administrative Procedure Act, has only recently referred to "the justice of . . . administrators or executives" in such a way as to contrast it from "justice according to law."⁸

There has been some chagrin on the part of the Commission, and, too, on the part of some of the members of the Practitioners' Association,⁹ on account of the failure of Congress to exempt the Interstate Commerce Commission from the provisions of the Administrative Procedure Act. The Commission was exempted from the provisions of the so-called Walter-Logan Bill,¹⁰ which was vetoed by President Roosevelt.

⁶ Sen. Rep. No. 597, 63d Cong., 2d Sess. (1914), at 10-11.

⁷ (1938) 5 ICC Practitioners' Journal 353, 358.

⁸ (1946) 32 A. B. A. Jour. 827.

⁹ (1946) 13 ICC Practitioners' Journal 429, 437 and (1946) 14 ICC Practitioners' Journal 26.

¹⁰ S. 915-H. R. 6324, 76th Cong., 1st. Sess. (1940).

I am afraid that hurt pride and injured feelings have been the cause of some not too clear thinking on the subject. Yet, there were excellent reasons why the Commission was not exempted. I have stated them on another occasion. I repeat them here:

First of all, the law treats administrative procedures functionally, and not by agencies.

Secondly, laws are not so drafted as to exclude those who have never committed the offenses sought to be stopped. X is not exempted from the law punishing for murder because he had not been guilty of murder up to the time the law was passed.

Thirdly, the law, in general, is based upon the Commission's General Rules of Procedure.

Fourthly, there are those who have a great deal of respect for the principle, "Who am I to draw a line, where God hath not." To have exempted the Interstate Commerce Commission from the Act would have been a signal for other agencies, such as Commissioner Freer's Federal Trade Commission, to claim exemption on the ground that they, too, are "good" agencies, and without need of salvation. The Congress did not care to pass judgment on each agency, and classify it as good, or bad, and then exempt or include, as seemed to be justified. Those who were representing the American Bar Association, the sponsor of the legislation, were firm in their convictions that it would be a mistake to exempt any agency as such, and that only certain functions should be exempted. The Interstate Commerce Commissioners, or, at least several of them, were told so far back as October, 1944, that it would be the purpose of the American Bar Association to oppose exemption of any agency.

The Senate Committee on the Judiciary, in reporting the bill,¹¹ on November 19, 1945, said:

Manifestly, it would be folly to assume to distinguish between 'good' agencies and others and no such distinction is made in

¹¹ S. 7, 79th Cong., 1st Sess. (1945).

the bill. The legitimate needs of the Interstate Commerce Commission, for example, have been fully considered but it has not been placed in a favored position by exemption from the bill.¹²

When the bill was reported by the House Committee on the Judiciary on May 3, 1946, it was pointed out in its report that:

Since it is drawn entirely upon a functional basis, it contains no exemptions of agencies as such.¹³

I do not think the Commission has any sound grounds for complaint.

The Chairman of the Legislative Committee of the Practitioners' Association, which had ardently supported the Commission's plea for exemption from the Act, in one of his reports to the Association, said:

In fairness to the Committee for the American Bar Association, it is proper to say that they gave us cooperation and that most of our suggested changes were adopted and reflected in the various revisions of the bill.¹⁴

Further, in the same report, it is said:

Your Committee regrets, of course, that it with the aid of Mr. Smith's Committee, was unable to secure an outright exemption of the Commission. It feels, however, that the Bill has been modified to such an extent that the Commission will not have too much difficulty functioning under it.¹⁵

So, as Commissioner Aitchison says:

Nevertheless, we have the Act, with the Commission not exempted, and we find there are many things in it which seem at first to make some change.¹⁶

I understand that the Attorney General is preparing a manual of administrative procedure containing his inter-

¹² Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945) at 5.

¹³ H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) at 10.

¹⁴ (1946) 13 ICC Practitioners' Journal at 429.

¹⁵ (1946) 13 ICC Practitioners' Journal 429 at 437.

¹⁶ (1946) 14 ICC Practitioners' Journal 26 at 27.

pretations of the Administrative Procedure Act, or at least some sections of it. I am told that the manual is not yet complete, and I have seen no part of it. So, I do not have the benefit of the Attorney General's view.

Formal discussions of "The Administrative Procedure Act and How It Affects the Interstate Commerce Commission" have been few, so far as I can ascertain. A prominent and well-informed practitioner discussed the subject just after the bill had been passed by both Houses of Congress, but before it had been signed into law by President Truman, on June 11, 1946.¹⁷ The new law was also discussed at the 17th Annual Meeting of the Association of Interstate Commerce Commission Practitioners, on October 3, 1946.¹⁸

Mr. Zoll, the practitioner, said:

... the procedure required by the Administrative Procedure Act does not differ fundamentally from that of the Commission. However, the Commission will have to make some changes in its practice, and it will I know be interesting for us to see what these changes will be.¹⁹

One of the Commission's "most-experienced" Examiners discussed the new Act informally, and, for the most part, "off-the-record," at a meeting of practitioners before the Commission, but only a very brief summary of what he said has been made available to us for reference.²⁰

Commissioner Aitchison, who is a member of the Commission's Committee on Rules and Reports, which has the initial duty of revising the Commission's "General Rules of Practice" in the light of the new Act, participated at some length in the forum discussion of the new Act at the Practitioners' meeting, to which I referred. Commissioner Aitchison said:

¹⁷ Zoll, "The Administrative Procedure Act and How It Affects The Interstate Commerce Commission" (1946) 13 ICC Practitioners' Journal 677.

¹⁸ (1946) 14 ICC Practitioners' Journal 26-37.

¹⁹ (1946) 13 ICC Practitioners' Journal 677 at 684.

²⁰ (1946) 13 ICC Practitioners' Journal 793-794.

Now, throughout the legislative process we were assured repeatedly that after all this bill was not going to interfere with the normal processes of the Interstate Commerce Commission. We were chided for taking the position that it did, and we were taunted to point out wherein it did make any change; and the statement was made repeatedly that the general practice of the Commission had been taken as a model upon which the bill was framed.²¹

Still lamenting the fact that the Commission was not exempt from the Act, Commissioner Aitchison criticizes the draftsmanship and characterizes it as being put together in a "clumsy, obscure, burdensome manner."²² He then goes on to say:

I think we will make a mistake if we assume that this tears everything up by the roots. I believe progress is to be made in giving force to the intent of Congress if we proceed a little slowly about making changes which are not obviously required. The necessity for them will develop. We will make mistakes. We will be corrected by the courts, and it may be found that we have acted wrongly in not making some changes.²³

Well, the Interstate Commerce Commission has been making mistakes now for sixty years. It has been "corrected" by the courts at practically every session of the Supreme Court of the United States, and that process is still going on. The Court just recently "corrected" the Commission's view that it could issue a certificate of public convenience and necessity based upon a particular policy, and then revoke or amend that certificate two years later, based on another policy, upon the claimed ground of having made a "mistake" in issuing the first certificate.²⁴ That ice was too thin for the Commission to skate on. It was so thin that the Supreme Court of the United States could see through it. So, if, in revising its "General Rules of Practice" the Commission makes some

²¹(1946) 14 ICC Practitioners' Journal 26 at 27.

²²(1946) 14 ICC Practitioners' Journal 26 at 27.

²³(1946) 14 ICC Practitioners' Journal 26 at 27.

²⁴United States v. Seatrain Lines, Inc. (January 6, 1947), 15 LW 4132.

errors, it will not be a new experience for it, and should not cause any lament.

Commissioner Aitchison further said:

Personally, I think we should take the rules as they stand as our base, and continue to enforce them until it is shown that it is imperatively necessary to deviate from them. . . . The requisite changes must be developed, as many of the features of the Commission's procedure have been developed, case by case.²⁵

Then, the President of the Practitioners' Association said to Commissioner Aitchison, who, by the way, is Chairman of the Commission again this year:

We are going to do all we can in the future, as we have in the past, to uphold the Commission's view on this subject.²⁶

I should tell you that this is the fourth time Commissioner Aitchison has served as Chairman of the Commission. His period of service as Commissioner, more than twenty-nine years, exceeds that of any of his predecessors, and also that of any member of a regulatory body, either federal or state. He has established a record that will probably never be equaled. In addition to his service as a member of the ICC he served nine years as a member of the Railroad Commission and the Public Service Commission of the State of Oregon.²⁷

Personally, I do not agree with the view expressed by Commissioner Aitchison, nor do I subscribe to the proposition that the Practitioners' Association should do all it can to uphold the Commission's views on the subject.

My own view is that the Commission's "General Rules of Practice" should be carefully studied, to determine to what extent, if at all, they are not in conformity with the Administrative Procedure Act. To the extent that they are found to be deficient under its standards they should be amended. That is the plain duty of the Commission.

²⁵ (1946) 14 ICC Practitioners' Journal 26 at 28.

²⁶ (1946) 14 ICC Practitioners' Journal 26 at 28.

²⁷ (1946) 14 ICC Practitioners' Journal 246.

The views of the Commission should be supported by the practitioners, individually, or group-wise, only to the extent that they are thought to be sound, and consistent with law. That is the plain duty of the practitioners, not only to the Commission, but to each other, and to their clients. Anything less than that is a subservience that does not become a member of the Commission's bar.

Senator Pat McCarran has said:

The terms of the statute are, of course, technical.²⁸

But I hardly think he would agree with Commissioner Aitchison's characterization of it as "being put together in a clumsy, obscure, burdensome manner."

I know of no instance in the past quarter of a century where the committees of Congress have been so careful to explain a bill and to state the intent of Congress so specifically as in the case of this legislation. The reports of the Senate and House Committees on the Judiciary are integral parts of the Act, and one who attempts to interpret the Act without consulting these reports is foolish indeed.

The Act, interpreted in the light of the Congressional intent, was intended by its framers to be "complete and plenary."²⁹

Senator Pat McCarran has paid this tribute to the law:

Although it is brief, it is a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under the law, as well as those invested with executive authority. It upholds law and yet lightens the burden of those upon whom the law may impinge.³⁰

As Senator McCarran has also said:

Because of its nature and consequence, and because it has been through a most rigorous and lengthy sieve of consideration by the

²⁸(1946) 32 A. B. A. Jour. 827 at 830.

²⁹(1946) 32 A. B. A. Jour. 830.

³⁰Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) at III.

Congress, the legislative documents which accompany and explain its purpose and operation are of immediate and permanent importance.³¹

These "legislative documents" have been brought together in a Congressional document known as "Administrative Procedure Act—Legislative History, 79th Congress, 1944-1946," (Sen. Doc. No. 248, 79th Cong., 2d Sess., 1946). This document, too, is indispensable to those who deal with the new act. This includes "him who seeks fair play" as well as "those invested with executive authority." This document, as you may know, will soon be again obtainable from the Government Printing Office. On January 15, 1947, the Senate ordered it reprinted—as Senate Document 248.

The Senate Committee on the Judiciary, at the very outset, summarized the approach of the Act by enumerating the principal problems which faced the Committee:³²

1. To distinguish between different types of administrative operations.
2. To frame general requirements applicable to each type of operation.
3. To set forth those requirements in clear and simple terms.
4. To make sure that the bill is complete enough to cover the whole field.

That Committee then took pains to point out that:

The bill . . . is not a specification of the details of administrative procedure, nor is it a codification of administrative law.³³

Without, at this time, making a section by section analysis of the Act, let us see what are its basic premises. Senator McCarran has specified them, but not necessarily in these words, to be:

1. To make administrative justice subject to democratic legislative processes. In other words, to subject the administrative agencies to statutory law.

³¹ Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) at 1.

³² Sen. Rep. 752, 79th Cong., 1st Sess. (1945) at 5.

³³ Sen. Rep. 752, 79th Cong., 1st Sess. (1945) at 7.

2. To require administrative agencies to make known their organization and their administrative procedures.

3. To require notice of, and opportunity to participate in, rule-making by agencies, regardless of whether otherwise required by statute.

4. To require notice and opportunity for use of settlement procedures.

5. To require separation of functions.

6. To outlaw "star chamber" proceedings.

7. To limit the investigatory processes to those actually required for the administration of the laws.

8. To provide for fair hearings, where hearings are required by statute, both as to rule-making and adjudication.

9. To provide that the courts shall decide all relevant questions of law—both statutory and constitutional.

10. To make abuse of discretion judicially reviewable.

11. To provide for judicial review in fact.

You will see, therefore, that the Act concerns itself basically with—

1. Publicity of Procedures.

2. Rule-Making.

3. Adjudication.

4. Judicial Review.

These will be discussed *seriatim*.

PUBLICITY OF PROCEDURES

Section 3 of the Act, which became effective September 11, 1946, requires every agency to separately state and currently publish in the Federal Register:

1. Descriptions of its central and field organization, including delegations of final authority, and the established places at which, and methods whereby, the public may secure information, or make submittals or requests.

2. Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as

well as forms and instructions as to the scope and content of all papers, reports, or examinations.

3. Substantive rules adopted, as authorized by law, and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public.³⁴

Under that section, also, each agency is required to publish, or to make available to public inspection, all final opinions or orders in the adjudication of cases, and all rules. There are certain exceptions with which we do not need to concern ourselves.

It is also directed that, save as otherwise provided by statute, matters of official record shall in accordance with published rule, be made available to persons properly and directly concerned, except confidential information withheld for good cause.

It is important to note that no person is in any manner to be required to resort to any organization or procedure not published as required by this section. The publication must be kept up to date. Secrecy both as to delegations of authority and rules, binding upon or applicable to the public, is prohibited.

Generally speaking, the Interstate Commerce Commission should find little, if anything, new in these requirements. Only a very minute and detailed check would reveal such instances as there may be where these requirements have not already been met. There were a few isolated instances where new publication was deemed desirable, at least as a matter of caution.

In the Federal Register of September 4, 1946,³⁵ the Commission published certain orders of July 7, 1944, March 12, 1945, and February 13, 1945, relating to the Commission's "Organization and Assignment of Work." These were, of course, supplemental to the publication of its "Organization and Assignment of Work" as published in 7 Federal Register 4515.

³⁴ (1946) 32 A. B. A. Jour. at 830-831.

³⁵ 11 Fed. Reg. 9703-9704 (Sept. 4, 1946).

However, in the Federal Register of September 14, 1946, the Commission published its current "Organization and Assignment of Work," as it deemed to be required by the new Administrative Procedure Act.³⁶

The duties of the Chairman of the Commission as prescribed by order of February 5, 1945, were published in the Federal Register of September 21, 1946.³⁷

With respect to the requirement that each agency formulate and publish a rule respecting access to its decisions, particularized rules, or orders, etc., the Commission will not need to formulate and publish any new rule. That was fully covered in its publication in the Federal Register of September 14, 1946, to which I have just referred. From its inception, it has been the practice of the Commission to publish its adjudications in volumes of reports, in the same manner as the decisions of the courts are published. There are now more than three hundred volumes of reported decisions.³⁸

While the Commission has published its decisions, it has not, in many instances, been publishing its orders. It has long been the thought of many practitioners that it should do so. There are many times when the language used in the order is much more important than what is said in its report or decision. It would seem that the Commission will now have to publish its orders, unless it be held that merely making them available to public inspection be considered as meeting the requirements of law.

The requirement of an agency rule on the availability of official records will probably not require that the Commission issue any new rule specifying generally what may be disclosed and what may not, and the routine and procedure to be followed in obtaining such public information as is available, since that has, in effect, been done.

³⁶ 11 Fed. Reg. 10305-10310 (Sept. 14, 1946).

³⁷ 11 Fed. Reg. 10662 (Sept. 21, 1946).

³⁸ There are 263 bound volumes of ICC and 44 volumes of MOC (Motor Carrier) reports up to January 1, 1947.

The "General Rules of Practice" before the Commission were adopted July 31, 1942, and became effective September 15, 1942. They were published in Volume 7 of the Federal Register at pages 6395 et seq., and are, of course, contained in the 1942 Supplement to the Code of Federal Regulations.

Rule 3 of the Commission's General Rules of Practice provides that:

Information as to procedure under these rules, and instructions supplementing these rules in special instances, will be furnished upon application to the Secretary of the Commission, Washington, D. C.

The principal "instructions supplementing these rules," so far as my knowledge goes, are:

1. Order of the Commission of December 1, 1931, prescribing revised regulations relative to authorizations of common officers and directors under Section 20a(2) of the Interstate Commerce Act.³⁹

2. Order of the Commission of October 23, 1935, prescribing special rules of procedure governing applications, under Section 77 of the Bankruptcy Act, for authority to solicit, use, employ, or act under or pursuant to, proxies, authorizations, or deposit agreements, in or in connection with reorganization or receivership proceedings.⁴⁰

3. Order of Division 4 of the Commission of November 27, 1941, relating to applications, under Section 1(18)-(20) of the Interstate Commerce Act, for permission to abandon lines of railroad or operation thereof.⁴¹

4. Order of Division 4 of the Commission of August 22, 1940, relating to procedure in corporate reorganizations, under Section 577 of Chapter 10, Title 11, of the United States Code, Supplement V.⁴²

5. Order of Division 4 of the Commission of October 14, 1940, prescribing regulations governing applications, under Section 5(2)

³⁹ 14 Code Fed. Reg. 667 at 669.

⁴⁰ 14 Code Fed. Reg. 683 at 690.

⁴¹ 6 Fed. Reg. 6210 at 6211 (Dec. 4, 1941).

⁴² 5 Fed. Reg. at 3593 (Sept. 7, 1940).

of the Interstate Commerce Act, for authority to consolidate or merge properties, etc.⁴³

6. Order of Division 4 of the Commission of February 7, 1941, relating to applications, under Section 1 (18)-(20), of the Interstate Commerce Act, for certificates of public convenience and necessity authorizing the construction, extension, acquisition, or operation of lines of railroad.⁴⁴

7. Order of Division 4 of the Commission of June 1, 1944, prescribing instructions governing special applications for exemption from the requirement that certain railroad securities issued under Section 20a of the Interstate Commerce Act be offered for sale at competitive bidding.⁴⁵

8. Order of Division 4 of the Commission of August 9, 1946, prescribing rules and regulations governing applications, under Sections 20a and 214 of the Interstate Commerce Act, for authority to issue securities, or to assume obligation with respect to such securities.⁴⁶

9. The Commission's regulations relating to the consolidation and reorganization of railroads, which were published in the original volumes of the Code of Federal Regulations, were amended by the Commission's order of October 17, 1946, to include references to the Commission's "General Rules of Practice."⁴⁷

RULE-MAKING

Section 4 of the Act, which relates to rule-making, is very intricate and interesting.

But, first of all, let us look at the definition of "rule-making," or, more particularly and more accurately, the definitions of "rule" and of "rule-making," as found in Section 1 of the Act.

Section 1(c) of the Act defines the term "rule" to mean: the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and

⁴³ 5 Fed. Reg. 4319 at 4322 (Oct. 31, 1940).

⁴⁴ 6 Fed. Reg. 1304 at 1305 (Mar. 6, 1941).

⁴⁵ 9 Fed. Reg. at 7205 (June 29, 1944).

⁴⁶ 11 Fed. Reg. 10119 at 10125 (Sept. 12, 1946).

⁴⁷ 11 Fed. Reg. 12797 at 12798 (Oct. 30, 1946).

includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing.

The same Section 1(c) defines "rule-making" as meaning:

agency process for the formulation, amendment, or repeal of a rule.

To those who are familiar with the work of the Interstate Commerce Commission, and its myriad duties, it will readily appear that the greater part of its activities come within the category of "rule-making" as defined by the Act.

The rule-making functions of the Interstate Commerce Commission that are subject to Sections 4 alone; and those that are subject to Sections 4, 7, 8 and 10 of the Act are hard to classify with exactness.

It is probably safe to say that the following would be subject to Section 4 only:

1. Orders, under Section 1(13) of the Act, requiring the filing of car-service rules and regulations.

2. Car-service orders, under Section 1(15) of the Act.

3. Orders, under Section 1(16) of the Act, respecting routing of traffic—except as to fixing the compensation, which is adjudication.

4. Issuance of certificates of public convenience and necessity, under Section 1(18)-(20) of the Act, with respect to extensions, constructions, and abandonments, in those cases where no hearing is requested by an interested party. These would also be subject to Sections 7, 8 and 10, if a hearing was requested by any interested party.

5. Prescription of rules respecting extension of credit for freight charges, under Section 3(2) of the Act.

6. Orders granting or denying relief from the long-and-

short-haul clause, under Section 4 of the Act, and generally referred to as "Fourth Section Orders."

7. Orders, under Section 6 of the Act, with respect to the filing of tariffs, etc.

8. Direction of routing of unrouted traffic, under Section 15(10) of the Act.

9. Orders, under Sections 17, 18, 19 and 24 of the Act, respecting organization and work of the Commission.

10. Prescription of rules relating to accounting and the filing of reports, under authority of Section 20 of the Act.

11. Proceedings, under Section 20a of the Act, with respect to securities issues, interlocking directors and officers, etc., where no hearing is requested. If a hearing is requested, then Sections 4, 7, 8 and 10 of the Administrative Procedure Act would be applicable.

The Commission's rule-making functions that are subject to Sections 4, 7, 8 and 10 would doubtless include:

1. Orders, under Section 1(9) of the Act, ordering carriers to make switch connections.

2. Orders, under Section 1(14) of the Act, establishing rules, regulations, and practices with respect to car service.

3. Orders, under Section 1(21) of the Act, requiring provision of facilities for car service or extension of lines of railroad.

4. Proceedings, under Sections 2 and 3 of the Act, with respect to elimination of unjust discrimination, undue or unreasonable preference or advantages.

5. Orders, under Section 3(5) of the Act, requiring common use of terminals.

6. Proceedings, under Section 5 of the Act, with respect to pooling of freight and earnings, consolidations, mergers, etc.

7. Proceedings, under Section 6(11) of the Act, with respect to physical connections between rail lines and docks.

8. Proceedings, under Section 13(3)(4) of the Act, respecting intrastate rates, etc.

9. Proceedings, under Section 15(3)(4) of the Act, respecting routes and routing.

10. Proceedings, under Section 15(6) of the Act, prescribing divisions of joint rates.

11. Proceedings, under Section 15(7) of the Act, respecting suspension of tariffs.

12. Valuation of carrier property, under Section 19a of the Act.

13. Prescription of safety regulations, under Section 25 of the Act.

These examples are, of course, taken from Part I of the Interstate Commerce Act, applicable to railroads. Similar functions, under Parts II, III and IV of the act, relating to motor carriers, water carriers, and freight forwarders, would be similarly classified.

Now, what are the requirements of Section 4 of the Act so far as rule-making is concerned?

1. General notice of proposed rule-making must be published in the Federal Register, unless all persons subject thereto are named and either personally served, or otherwise have actual notice thereof in accordance with law.

2. The required notice must contain—

(a) A statement of the time, place, and nature of public rule-making proceedings.

(b) Reference to the authority under which the rule is proposed.

(c) Either the terms or substance of the proposed rule, or a description of the subjects and issues involved.

These requirements do not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency, for good cause, finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

3. After the requisite notice has been given, the agency must afford interested persons an opportunity to participate in the rule-making, through submission of written

data, views, or arguments, with or without opportunity to present the same orally in any manner.

4. The agency is then required to incorporate in any rules adopted a concise general statement of their basis and purpose.

There is this very important exception. Where rules are required by statute to be made on the record after opportunity for agency hearing, Section 7 of the Act, relating to hearings, and Section 8, relating to decisions, are applicable. The provisions of those sections are discussed later.

5. With certain exceptions not necessary to be mentioned, rules cannot become effective for at least thirty days after their required publication.

6. Any interested person is given the right to petition for the issuance, amendment, or repeal of a rule.

This section, of course, applies only where rule-making is not governed by other statutes. The principal purpose is to provide for public participation in rule-making.

The provisions respecting full notice are applicable regardless of whether such notice is required to be published in the Federal Register.

You will note the requirement that the notice must fairly apprise interested persons of the issues involved, so that they may present relevant data or argument.

The Report of the House Committee on the Judiciary says:

The required specification of legal authority must be done with particularity.⁴⁸

I think I can give you what will possibly be the world's classical example of the disregard of a statute.

Paragraphs (10) to (15) of Section 1 of the Interstate Commerce Act, as amended, constitute what is generally referred to as the Esch Car Service Act, originally enacted on May 29, 1917 (40 Stat. 101, 49 U. S. C. A. § 1).

⁴⁸ H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) at 24.

Paragraph (14) of that section gives the Commission the power, after hearing, to:

establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this act, including the compensation to be paid for the use of any locomotive, car, etc.

That is the only provision in the Interstate Commerce Act which even pretends to give the Commission the power to fix the compensation for the use of freight cars.

The Commission has just recently instituted an investigation, on its own motion:

for the purpose of determining whether the establishment of a rate of \$2.00 per day or other increased rate to be paid to the owner for the use of each car during periods of car shortage (except tank and refrigerator) by any common carrier would promote greater efficiency in the use and increase the supply of cars; with the view to the making of findings and the entry of an order or orders, under the authority of the Interstate Commerce Act (49 U. S. Code, Sections 1-27), and particularly Section 1(10), (11), (13) and (14) thereof, requiring the establishment of an increased basis and rate of compensation for car hire during periods of car shortage if it be found that it will promote greater efficiency in the use and increase the supply of cars.⁴⁹

You will observe how the Commission particularized. Its notice says that it is to consider making an order or orders "under the authority of the Interstate Commerce Act (49 U. S. Code, §§ 1-27)," and then goes on to particularize as to paragraphs (10), (11), (13) and (14) of Section 1. Apparently realizing the doubt that exists that under these particularized paragraphs it can support any order of the kind proposed, it brings in the entire Interstate Commerce Act, consisting of twenty-seven sections, of which twenty-six and a half have nothing more to do with the subject than the name of Adam's off ox. Talk about your "shot-gun" citations!

⁴⁹ ICC Docket 29670—Order of Dec. 18, 1946.

But, I suppose the Commission acted upon what it thought was good precedent. The story is told of an incident that occurred very early in the days of the New Deal when the President found it necessary to make some revisions in the relative values of the dollar and of gold, and it was conceived that one method of carrying out those revisions was to purchase gold at an altered price. But the question arose as to whether there was any power to do that and the Attorney General, who was the Honorable Homer Cummings, was asked for an opinion. The members of his staff searched diligently, but they were unable to find any specific power that was really directed toward what it was felt, as a matter of national policy must be done, and Mr. Cummings was presented with the draft of an opinion which pointed to certain powers which almost, but not quite, authorized what was proposed to be done, and certain others which almost, but did not quite, authorize what was to be done, and Mr. Cummings contributed the brilliant solution that out of that galaxy of powers there somehow emerged the power to do what was felt had to be done.

The Commission has applied that galaxy theory of citation, notwithstanding the requirements of the Administrative Procedure Act.

But it must not be forgotten that it was that sort of thing which brought about the enactment of the Administrative Procedure Act.

So far as this phase of the Act is concerned, it is doubtful whether any particular rule of the Commission needs to be changed. It does appear, however, that the Commission should observe both the letter and the spirit of the statute.

The Commission has given recognition to the requirement for publication of proposed rules. In the Federal Register of December 14, 1946, at pages 14337-14338, you will find a notice of the proposed revision of the rules relating to safety regulations governing motor carriers

and the transportation of explosives. It should be pointed out, however, that it has long been the practice of the Commission to give notice of such changes.

The requirement that an agency accord any interested person the right to petition for the issuance, amendment, or repeal of a rule, is new. It is substantive.

The Commission is required to give full and prompt consideration to the petition. If denied, the petitioner must be notified.

It would seem that the Commission's "General Rules of Practice" should be amended so as to specifically take care of this newly-acquired right.

ADJUDICATIONS

Section 5 of the Act relates to adjudication. It is applicable to those adjudications of the Commission where some other statute requires the determination to be on the record and after opportunity for hearing. The exceptions need not concern us, since only one of them seem to be applicable to the Commission's activities.

"Adjudication" is defined by Section 2(d) of the Act to mean "agency process for the formulation of an order."

Cases subject to trial *de novo* in court are excepted from its provisions. This would, therefore, remove from its provisions the so-called "reparation" cases of the Commission, because in such cases the Commission's order is but *prima facie* evidence in the courts.

Section 5(a) provides for timely notice of the time, place and nature of the hearing, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted. The issues must be specified with particularity. Their statement in general statutory language is not sufficient.

Section 5(b) requires that the parties be given an opportunity for settlement or adjustment of the issues, in whole or in part. The procedures for such negotiations

must be stated in the rules. This is required by Section 3(a) of the Act.

These requirements will not necessitate much, if any change in the Commission's rules, except by way of clarification, and, perhaps, a little more detailed statement of some of them. However, the Commission's present rules provide, in effect, for what is here required.

Section 5(c) relates to separation of functions. It was designed to remedy the complaint that prosecutor, judge, and jury were combined in administrative procedures.

So far as the Interstate Commerce Commission is concerned, there is a very important exemption in the statute. It says,

This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.

That language is so broad that it removes from the statute a large portion of the Commission's proceedings. Where it is applicable, however, it should break up a bad practice of counsel for the Commission conferring *ex parte* with Examiners handling the proceeding. According to the Report of the House Committee on the Judiciary⁵⁰ these exemptions are not intended to apply to accusatory proceedings. The Commission's rules should, in my opinion, be so amended as to be in harmony with both the letter and the spirit of this very basic provision of the law.

Section 5(d) provides for declaratory orders, to be issued in the sound discretion of the agency, to terminate a controversy or remove uncertainty. This is, of course, a new power, and the conditions under which it will be exercised, and the procedures relating to its invocation, etc., will have to be stated in the Commission's rules. Naturally, they are silent on the subject at the present time.

⁵⁰ H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) at 30.

ANCILLARY MATTERS

Section 6 of the Act is captioned "Ancillary Matters."

Briefly summarized, Section 6(a) provides that—

1. One compelled to reappear in person before any agency or representative thereof is accorded the right to be accompanied, represented, and advised by counsel, or, if permitted by the agency, by other qualified representative.

2. Every party is accorded the right to appear in person, or by or with counsel, or other duly qualified representative, in any agency proceeding.

3. Nothing in this Act is to be construed either to grant or to deny any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

The right of a person or a party to be represented and advised by a qualified practitioner before the Commission, whether lawyer or non-lawyer, has long been recognized by the Commission, and I know of no instance where it has been denied. While it will doubtless be necessary to amend the Commission's rules so as to fully state these privileges, it will be nothing new as a matter of practice.

Section 6(b) relates to investigations. It says that:

No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law.

While the purpose of this provision, as stated by the House Committee on the Judiciary,⁵¹ is to preclude "fishing expeditions" and investigations beyond jurisdiction or authority, it seems almost certain that those objectives cannot be fully accomplished. Many a "fishing expedition" can be conducted within the Commission's jurisdiction or authority. The Commission's policy with respect to investigations has been very disturbing, and at times somewhat disconcerting, and certainly not settled. However, there

⁵¹ H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) at 32.

is no use of detailed discussion of that subject here, because there appears to be nothing of a remedial nature provided in the statute.

There is also a provision in this Section whereby a person compelled to submit data or evidence is entitled to retain a copy, procure a copy, or inspect the record. The Commission's rules will need implementation with respect to these newly-acquired rights.

Section 6(c) deals with subpoenas. Rule 56 of the Commission's "General Rules of Practice" is substantially consistent with the new Act, and it does not appear that any material change in the rule will be found necessary. So far as the Commission is concerned, the subject is not of enough importance to justify much discussion.

Section 6(d) relates to agency denials of requests. First of all, it requires that prompt notice shall be given of the denial, in whole or in part, of any written application, petition, or other request of any interested person made in connection with any agency proceeding. That has been the consistent practice of the Commission and will require no change in its procedures.

However, it is also provided that "such notice shall be accompanied by a simple statement of procedural or other grounds." This requires the agency to state the actual grounds for the denial, and to apprise the party of any other or further administrative remedies or recourse he may have. This does not apply "in affirming a prior denial or where the denial is self-explanatory."

This will require new procedure on the part of the Commission, and many a time will it be reminded of this statement once made by Mr. Justice Frankfurter:⁵²

Those who decide should record their judgments and give reasons for them, which in itself will have a fruitful psychological effect. You feel much more responsible—all of us do—if we have to sit down and write out why we think what we think.

⁵²(1938) 12 Univ. of Conn. L. Rev. 260 at 276.

It will no doubt be pretty hard put to state the reasons for some of its denials.

HEARINGS

Section 7 relates to hearings.

This section applies only where hearings are required by some other statute, or by Section 4 or Section 5 of this Act. These, you will recall, relate to rule-making and adjudication.

The provisions of Section 7(a), relating to presiding officers at hearings, is very largely based upon the Commission's present procedure, and would seem to call for but little, if any, change in the Commission's rules—except as to one subject.

That Section contains a provision for affidavits of bias, or personal disqualification. There is nothing like that in present law, or in the Commission's rules. So, it will be necessary to write into its rules specific provision for the handling of such problems, even though, so far as I know, no such instance has arisen.

Section 7(b) prescribes the powers of hearing officers. However, the Act specifically says that these powers are "subject to the published rules of the agency and within its powers."

It is provided that hearing officers shall have the power to issue subpoenas. Subpoenas are now issued only by the Secretary or a member of the Commission.

It is also provided that the hearing officer shall have the power to take depositions. There is no authority in the Interstate Commerce Act for a Commissioner or an Examiner to take depositions. Therefore, it would appear that such a provision as that contained in the Administrative Procedure Act cannot be made effective as to the Commission.

Section 7(c) relates to evidence. It provides, among other things, that:

no sanction shall be imposed or rule or order be issued except on consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.

The Commission's present rules (Rule 75) provide that any evidence which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States shall be admissible in Commission hearings.

The one rules goes to the weight, the other to the admissibility.

Section 7(d) contains a very important provision:

Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show to the contrary.

There is no specific rule of the Commission on this subject, but the idea is pretty well covered by existing rules relating to reconsideration, etc.

DECISIONS

Section 8 relates to decisions, and applies to the same proceedings as Section 7.

This section pretty generally follows the Commission's present procedures and rules.

Section 8(b), however, contains some new requirements:

1. The record is required to show the ruling on each finding, conclusion, or exception proposed by any party to a proceeding.

2. All decisions are required to include a statement of—

- (a) Findings and conclusions, as well as the reason or basis therefor, upon all of the material issues of fact, law, or discretion present on the record; and

(b) The appropriate rule, order, sanction, relief, or denial thereof.

These provisions are in line with what the practitioners have long urged before the Commission, and should make for better considered opinions and decisions.

SANCTIONS AND POWERS

Section 9, relating to sanctions and powers, really has so little application to the Commission, that it will not be discussed here.

JUDICIAL REVIEW

Section 10 of the Administrative Procedure Act relates to judicial review.

That section does not apply—

1. Where statutes preclude judicial review.
2. Where agency action is by law committed to agency discretion.

I know of no statutes administered by the Interstate Commerce Commission where judicial review is "precluded." There are, however, a number of instances where the statutes do not provide for judicial review of the Commission's actions, and as to which the courts have held that there is no judicial review.⁵³ To use the words of Judge Frank:

When the ICC has ceremonially woosh-wooshed, judicial scrutiny is barred.

There are some statutes administered by the Commission where agency action is by law committed to agency discretion.⁵⁴

The legislative history of the Administrative Procedure Act makes it clear that it does not purport to give the right

⁵³ See, for instance, *Butte, Anaconda & P. Ry. Co. v. United States*, 290 U. S. 127, 54 Sup. Ct. 108, 78 L. ed. 222 (1933).

⁵⁴ See, for instance, *United States v. Griffin*, 303 U. S. 226, 58 Sup. Ct. 601, 82 L. ed. 555 (1938).

of judicial review in any instance where it does not already exist.

Statutory jurisdiction to enjoin and set aside an order of the Interstate Commerce Commission was granted by the Hepburn Act of June 29, 1906.⁵⁵ As supplemented by the Urgent Deficiencies Act of October 22, 1913,⁵⁶ that jurisdiction is now in the United States District Courts, with appeal directly to the Supreme Court of the United States.

Section 10(a) of the Administrative Procedure Act limits the right of judicial review to "any person suffering a legal wrong." So far back as 1923 the Supreme Court of the United States applied that standard in Interstate Commerce Commission cases. In *Edward Hines Yellow Pine Trustees v. United States*⁵⁷ the court said:

They must show also that the order alleged to be void subjects them to legal injury, actual or threatened.

It has long been the rule that judicial review of the Commission's orders is limited to those having a legal right or interest that would be injuriously affected by the order.⁵⁸

It would seem, therefore, that Section 10(a) does not make any change in the existing law so far as the Commission is concerned.

The venue of actions to judicially review orders of the Interstate Commerce Commission is not affected by Section 10(b) of the Administrative Procedure Act.

Section 10(c) of the Administrative Procedure Act relates to reviewable acts.

One of the clauses in this section reads as follows:

Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon review of the final agency action.

⁵⁵ 34 Stat. 584 (1906), 49 U. S. C. A. § 1.

⁵⁶ 38 Stat. 208, 219 (1923), 23 U. S. C. A. § 46.

⁵⁷ 263 U. S. 143, 44 Sup. Ct. 72, 68 L. ed. 216 (1923).

⁵⁸ *Moffat Tunnel League v. United States*, 289 U. S. 113, 53 Sup. Ct. 543, 77 L. ed. 1069 (1933).

This provision is consistent with the decisions of the Supreme Court to the effect that preliminary or procedural orders are not judicially reviewable as such where there is available a subsequent and adequate remedy at law.⁵⁹

The last clause in Section 10(c), as to when agency action may be considered as "final" for the purposes of judicial review, does not affect the Interstate Commerce Commission for two reasons. First, one must still exhaust his administrative remedies. Secondly, the Commission's rules already provide for requests for reconsideration of any of its actions.

Section 17(a) of the Interstate Commerce Act makes a petition for reconsideration a condition precedent to judicial review.

Section 10(d) relates to *interim* relief. It authorizes any agency, pending judicial review, to postpone the effective date of any action taken by it. Section 17(8) of the Interstate Commerce Act has a substantially similar provision. The Commission's procedures provide for it, and no change therein will be necessary.

Section 10(e) relates to the scope of judicial review.

This section provides that the courts shall:

1. Compel agency action unlawfully withheld or unreasonably delayed.
2. Set aside agency action, findings, or conclusions for any one or more of several reasons.

The grounds for setting aside agency action are there listed as:

1. Arbitrary, capricious, an abuse of discretion, or not in accordance with law.
2. Contrary to constitutional right, power, privilege, or immunity.
3. In excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

⁵⁹ Shields v. Utah-Idaho Central Ry. Co., 305 U. S. 177, 59 Sup. Ct. 160, 33 L. ed. 111 (1938).

4. Without observance of procedure required by law.
5. Unsupported by substantial evidence.
6. Unwarranted by the facts—to the extent that the facts are subject to trial *de novo* by the reviewing court.

It is also provided that the court shall review the whole record, or such portions of it as may be cited by any party, and that due account shall be taken of the rule of prejudicial error.

The grounds upon which a court will set aside an order of the Interstate Commerce Commission have been stated by the court⁶⁰ to be:

1. Beyond the power which the Commission could constitutionally exercise.
2. Beyond the Commission's statutory power.
3. Based upon a mistake of law.
4. Rate established is so low as to be confiscatory, and in violation of the constitutional provision against taking property without due process of law.
5. Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without supporting evidence.
6. Authority exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.

The courts have generally applied the list of "substantial evidence" being required to sustain a Commission order.

I see nothing in the Administrative Procedure Act which limits or expands judicial review of the orders of the Interstate Commerce Commission.

Section 10(e) specifically requires the courts to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of any agency action. Thus, in the last analysis, questions of law are left for the courts.

⁶⁰ ICC v. Union Pacific R. Co., 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308 (1912).

EXAMINERS

Section 11 of the Act deals with Examiners. When this section becomes effective, on June 11, 1947, the Commission's Examiners will be practically independent of the Commission. As Commissioner Aitchison has lamented:

First, we will lose control of the examining staff. Even our recommendations with respect to competency are not to be considered when their salaries are fixed by another body of the government.⁶¹

As to this one may comment that no longer will it be possible for an Examiner to be deprived of promotion and pay because a petulant Commissioner dislikes his conduct of a particular proceeding. An Examiner enjoying Civil Service status, and independent of whims and prejudices, is bound to be a better Examiner than one who does not enjoy such freedom of thought and action.

Of course, one who attempts to cover a subject so broad and intricate as this must necessarily leave much unsaid. To have discussed every point in detail would have consumed an inordinate amount of time. So, there will be those who will find points that have been omitted, and there will be those who will not agree with the views herein expressed. But, I can only say that I have done my best in the light of the size of the subject and the limited amount of time available for the preparation of this paper.

I thank you for your attention and for your patience.

DISCUSSION PERIOD

FEBRUARY 5, 1947

The Session Convened at 8:00 p.m.

QUESTION: Mr. Miller, I understand you to say that you do not think this Act expands the scope of judicial review of Commission orders in any respect. In that connection

⁶¹(1946) 14 ICC Practitioners' Journal 26 at 27.

I am interested in the statement you made of Judge Frank's dissent about the woosh-woosh of the Commission in the rulings of the court; that on questions of evaluation the Commission has the final word. I wonder whether the provision in Section 8 to the effect that there must be a statement of the reasons for the finding would not go part of the way toward meeting Judge Frank's objection there that the Commission had not fully stated the reasons upon which it found this valuation?

MR. MILLER: There is no question that there is some merit in your position. What is provided there should be of some help in particular instances. But I think Judge Frank was lamenting the fact that no judicial review is provided in some types of cases so that you cannot get any of the questions before the court. In other words, suppose the Commission does not state its reasons and suppose it is one of those cases falling within the category on which no judicial review is provided. You still have no more remedy under this Act than you had before the Act was passed.

QUESTION: Does not this Act now permit review in a case where the Commission has failed to comply with a statutory requirement, and is there not a statutory requirement here that it fully state the reasons for its finding? Yet in this case Judge Frank says the Commission did not fully state the reasons for its findings. Why does it not follow that it has violated the statute?

MR. MILLER: I have not the slightest doubt that what I say to you now is going to be quoted against me some time in the future. But I am going to say it anyway.

Your theory is that this statute would make judicially reviewable something that is not now judicially reviewable. Is that true?

QUESTION: Yes. That a possible connection could be made for that point of view anyway.

MR. MILLER: I wanted to get the issue clearly drawn between your position and mine.

My view is that no act or proceeding or order is made judicially reviewable by this statute that is not already judicially reviewable. I am speaking now, and limiting my answer strictly, to the Interstate Commerce Commission. In other words, if the Interstate Commerce Commission, in a proceeding where its order is not judicially reviewable, violates 14 or 40 provisions of the Administrative Procedure Act, it is my view that you cannot get that case before the court because it is basically not judicially reviewable and this statute does not make it so. I may have to try it some time and I may reverse myself by judicial decision, but that is my present view of it.

QUESTION: You do not think that the statute intended to make it reviewable?

MR. MILLER: No. I think that the history of the statute, the Reports of the Committees, make it perfectly clear that no judicial review is provided by this statute in instances where judicial review is not already provided by other statutes. The purport of it, as I understand it, was to see to it that judicial review, when granted, is real judicial review and not merely a matter of formality. I hope that your view is right and that mine is wrong.

QUESTION: It seems to me that you are making this language meaningless then. The Commission can go right ahead the way it has without stating its reasons and still be immune from review?

MR. MILLER: I think that is perfectly true in those instances where the Commission issues orders that are not made judicially reviewable. I hope I am wrong. I hope the court holds me to be wrong, but I am giving you my honest conviction about the statute at the present time.

QUESTION: Mr. Miller, you took the attitude that the new procedural regulations with reference to hearings and

examiners would be applicable in all cases presented before the Commission. We know that the Commission has had the practice of setting numerous matters for hearings. But do not Sections 7 and 8 apply only to those matters which by statute are required to be made part of the record after opportunity for an agency hearing? In most instances my opinion is that the statute is silent and the Commission merely exercises its discretionary power in setting them for hearing?

MR. MILLER: I think I would be inclined to agree with part of your statement anyway. But we have several different kinds of proceedings before the Commission in which hearings are held. For example, the X railroad files an application for authority to abandon a part of its mileage, or to extend a part of its mileage. Due notice must be given by publication in accordance with the statute. That proceeding comes under Section 1, paragraph 18 of the Interstate Commerce Act. As to that proceeding, no hearing is required so far as the statute is concerned.

Whether it be an abandonment or extension, let us say Mr. X, Mr. Y, Mr. Z, or three or three hundred people protest to the Commission or object. They read this notice in the paper and the notice says, "If you have got anything to say about it, notify the Interstate Commerce Commission." The Interstate Commerce Commission gets three to three hundred protests, so to speak. Of course, even though a hearing is not required by the statute in so many words, just fair dealing would require that those people be heard. So it has been the practice of the Commission since 1920 to accord a hearing in those cases and to accord that hearing at the place most convenient to those people who are protesting. Thus, we have a situation where a hearing is required by the statute; another where a hearing is not required by the statute but where it is accorded; and a third where no hearing is required

and no hearing is accorded. No question arises as to the case where the statute specifically requires the hearing. As to those cases where the statute is silent but the Commission's practice accords a hearing, it is my view that since the Commission accorded the hearing and construed the statute as in effect requiring a hearing, then those provisions of Sections 7 and 8 and 10 would be applicable. At least that is the position I would take.

QUESTION: The reason I put the question is that most of the agency representatives appearing here have not taken that view. I did not know whether the Commission had expressed itself on it.

MR. MILLER: The Commission has not, so far as I know, expressed itself one way or the other on the subject. But a hearing is a hearing and in that one instance you have almost an implied requirement for a hearing. If the Commission is going to err on either side, it ought to err on the side of administrative justice in my opinion.

THE ADMINISTRATIVE PROCEDURE ACT IN ITS APPLICATION TO THE FUNCTIONS OF THE DEPARTMENT OF AGRICULTURE

W. CARROLL HUNTER

The Supreme Court has recognized on several occasions that courts and administrative bodies are collaborative instrumentalities of justice.¹ The phenomenal growth of administrative tribunals in recent years is, as observed by Mr. Justice Frankfurter, in response to "the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process."² This need during the last two decades naturally and understandably led to the growth of administrative agencies, and to the delegation to them not only of executive power but legislative and judicial powers as well. Variations in the scope of jurisdiction and discretion conferred and the procedures to be followed were concomitants of the growth of these agencies in a series of emergencies that did not afford time for careful study of administrative techniques in their relation to long established methods of adjudication.

Initial outcries and misgivings concerning the administrative process have gradually given way, however, to the sobering realization and ultimate conviction that certain functions of government borne of a complex society do not lend themselves to the traditional ways of legislatures or courts. The administrative process was here to stay. The basic problem was one of accommodating the newcomer within the established framework of government. Judicial

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¹ *United States v. Ruzicka*, U. S., 67 Sup. Ct. 207, 91 L. ed. 229 (1946); *United States v. Morgan*, 307 U. S. 183, 191, 59 Sup. Ct. 795, 83 L. ed. 1211 (1939).

² *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 142, 60 Sup. Ct. 437, 84 L. ed. 656 (1940).

self-limitation gradually established the respective spheres of courts and administrative agencies. There remained, however, a distinct lack of uniformity in the practices of various agencies, and occasionally also a lack of application of principles well established in the judicial process and acknowledged as tested safeguards of fair hearings and sound decisions affecting personal and property rights. A seemingly infinite variety of economic problems dictated variations in techniques and in the breadth of permissible discretion, but it was recognized that through the process of administering broad declarations of policy ran a thread of similarity responsive to uniform treatment and correlation with established judicial processes.

The history of legislative efforts during the last decade to simplify and render uniform the procedures of federal administrative agencies and to define their relation to the public and to the courts is familiar to all of us. Suffice it to say that in the Administrative Procedure Act³ the ideas of the American Bar Association, interested scholars, judges, and the Attorney General's Committee on Administrative Procedure have been carefully sifted and integrated. The Act was enacted only after extensive hearings and a full expression of the views of interested agencies. It represents a progressive step forward despite the difficulties presented in an effort to deal generally with the functions of the numerous federal administrative agencies on a horizontal basis.

The principal provisions of the Act may be briefly outlined. The administrative agency must publish its organization and such of its rules, procedural and substantive, as are intended for the guidance of the public, and it must also make available for the inspection of the public such of its records, including opinions and orders in adjudication, as are not required to be published. The only exceptions to the informational requirements are matters of confidence and of internal management. Agency action

³ 60 Stat. 237, etc. (1946), 5 U. S. C. A. ch. 19.

consists principally of rule-making and of adjudication. The Act prescribes the manner in which agency action of a substantive nature must be taken and provides that any interested person may, except as precluded by other statutes, obtain a judicial review of the justiciable questions arising out of such action. The agency action may be formal or informal, depending on whether the final action taken is required by a governing statute to be based upon a hearing record. The right to judicial review is extended to agency action, with the important distinction that the "substantial evidence" rule must be observed by the reviewing court in cases where the review is required by a governing statute to be based upon an agency hearing record.

Procedural rules and substantive rules of a non-regulatory nature, such as rules relating to agency management, public property, loans, grants, benefits or contracts, are exempt from the rule-making process. Notice of any proposal to make a substantive rule of a regulatory nature must be published and an opportunity afforded to interested persons informally to present their views. A rule may not become effective before thirty days following publication. It is recognized that such an emergency may be presented that the notice cannot be given or that the rule must become effective prior to the expiration of the thirty-day period. Informality in the rule-making process gives way to formal proceedings where a governing statute requires the rule to be based upon an agency hearing record. The proceeding is then assimilated in most respects to the formal adjudicatory process in cases where a governing statute requires agency adjudication itself to be based upon a hearing record. There are important exceptions to this; for instance, an agency need not observe segregation in the formal rule-making process and may, in an emergency, dispense with an intermediate decision by the presiding officer. The Act seeks to insure the utmost fairness in the rule-making and adjudicatory processes including

the disclosure of reasons which underlie agency action. The requirement that examiners with independent status shall preside in all formal proceedings is intended to insure fair treatment and to contribute to sound decisions.

THE FUNCTIONS OF THE DEPARTMENT OF AGRICULTURE

In earlier years, the Department of Agriculture was engaged primarily in research related to the science of agriculture. Now, however, its power with respect to agriculture and forestry are extensive and diversified. The Department of Agriculture is deeply concerned with every provision of the Act. It administers both regulatory and non-regulatory statutes, and in the exercise of its statutory powers it issues both procedural and substantive rules. Some of its substantive rules are informally issued and others are subject to the formal rule-making process of the Act. It also engages in agency adjudication.

Non-regulatory Powers.—There are many departmental powers of a non-regulatory nature which will be considered principally from the point of view of the informational requirements of Section 3 of the Act. These are powers of the Agricultural Research Administration, in the conduct of scientific research in agriculture; the Farm Credit Administration, Rural Electrification Administration and Farmers' Home Administration, in the broad field of agricultural credit; the Commodity Credit Corporation, in supporting prices, granting subsidies, and making commodity loans, purchases and sales; the Soil Conservation Service and the Production and Marketing Administration, in formulating and carrying out, through local committees of farmers and of agencies organized under state laws, practices designed to conserve the nation's greatest resource—its soil; the Forest Service, in the management of our forest lands; the Federal Crop Insurance Corporation, in affording additional security to farmers by providing insurance against the loss of crops from drought and other unavoidable causes. These responsibilities in-

volve the promulgation of procedural and substantive rules, including declarations of policy and interpretative rulings, which are required to be published in the Federal Register pursuant to Section 3. Substantive rules in connection with these programs are exempt from the rule-making process of Section 4 since they relate either to public property, loans, grants, benefits or contracts. Any adjudication, as that term is defined in the Act, involved in these activities is exempt from the procedural requirements of Sections 5, 7, and 8, because the adjudication is not required to be made upon the basis of an agency hearing record.⁴

Regulatory Powers.—The exercise of regulatory powers of the Department is subject not only to the informational requirements of Section 3 but also to the rule-making and adjudicative processes prescribed by the Act. These powers are conferred by more than a score of statutes. The more important statutes are as follows: the Packers and Stockyards Act,⁵ which provides for the regulation of rates and practices in connection with stockyard services and the handling of poultry; the Perishable Agricultural Commodities Act, 1930,⁶ which provides for the regulation of the handling of perishable agricultural commodities and prohibits unfair practices in connection therewith; the Commodity Exchange Act,⁷ which provides for the regulation of commodity exchanges and prohibits unfair practices in connection with transactions thereon; the Agricultural Marketing Agreement Act of 1937,⁸ which provides

⁴ The Department's responsibilities under the Contract Settlement Act, 58 Stat. 699 (1944), 41 U. S. C. A. §§ 101-125, and the Surplus Property Act, 58 Stat. 766 (1944), 50 U. S. C. A. §§ 1611-1646, also are subject only to § 3.

⁵ 42 Stat. 159 (1921), 7 U. S. C. A. §§ 181-229; 9 Code of Fed. Reg. 201-204, as amended in Cum. Supps. 1944, 1945, 11 Fed. Reg. 2630 (Mar. 14, 1946), 9184 (Aug. 23, 1946).

⁶ 46 Stat. 551 (1940), 7 U. S. C. A. § 499(a)-499(r); 7 Code of Fed. Reg. 46, as amended in Cum. Supp. (1943), 11 Fed. Reg. 224 (Jan. 4, 1946).

⁷ 42 Stat. 993 (1922), 7 U. S. C. A. §§ 1-17(a); 17 Code of Fed. Reg. 1-7, 100, as amended in Cum. Supp. (1944) and Parts 8-11, 150 added, Supp. 1945.

⁸ 48 Stat. 31 (1933), 7 U. S. C. A. §§ 601-602, 608, 608(a)-608(e), 610-612, 613. See also 49 Stat. 781 (1935), 7 U. S. C. A. § 851 for Anti-Hog Cholera Serum and Virus Regulation.

for the regulation of the handling of specified agricultural commodities (milk and other commodities) for the purpose of maintaining the purchasing power of the producers thereof; the Agricultural Adjustment Act of 1938,⁹ which provides for farm marketing quotas for basic agricultural commodities; the Sugar Act of 1937,¹⁰ which provides for the regulation of marketing and importation of sugar; the United States Warehouse Act,¹¹ which provides for the regulation of warehousemen storing agricultural commodities; the Tobacco Inspection Act,¹² which provides for the designation of tobacco auction markets for federal inspection service; the Meat Inspection Act,¹³ which provides for the inspection of meat; and the Federal Seed Act,¹⁴ which provides for the regulation of the handling of seeds. The Department also develops, under appropriate legislation, official standards for fruit and vegetable containers,¹⁵ cotton and cotton linters,¹⁶ grains,¹⁷ meats,¹⁸

⁹ 52 Stat. 38 (1938), 7 U. S. C. A. §§ 1301, 1311-1376.

¹⁰ 50 Stat. 1100 (1937), 7 U. S. C. A. §§ 1100-1183; 7 Code of Fed. Reg. 801-802, 821 as amended in Cum. Supps. 1944, 1945, 11 Fed. Reg. 705, 1339, 2149, 2213, 2585, 2814, 3149, 3150, 3243, 4522, 5053, 5466, 5467, 5468, 7563, 9732, 10256, 10575, 11441, 13691, 14609, 14610, 14611 (Jan. 18, 1946 to Dec. 24, 1946), 12 Fed. Reg. 249 (Jan. 6, 1937).

¹¹ 39 Stat. 486 (1916), 7 U. S. C. A. §§ 241-273; 7 Code of Fed. Reg. 101-114, 151, as amended in Cum. Supps. 1944, 1945.

¹² 49 Stat. 731 (1935), 7 U. S. C. A. §§ 511-511q. See Note 19 *supra*.

¹³ 49 Stat. 731 (1935), U. S. C. A. §§ 71-96; 9 Code of Fed. Reg., (Supp. 1945) 251-279, as amended 11 Fed. Reg. 7714 *et seq.* (July 13, 1946) designated Parts 1-29, 11 Fed. Reg. 11189 (Oct. 2, 1946).

¹⁴ 53 Stat. 1275 (1939), 7 U. S. C. A. §§ 1551-1610; 7 Code of Fed. Reg., (Cum. Supp. 1943) 201, as amended Supp. 1945, 11 Fed. Reg. 7330 (July 2, 1946).

¹⁵ Standard Containers Act, 39 Stat. 673 (1916), 15 U. S. C. A. §§ 251-257(i), 7 Code of Fed. Reg. 41, as amended in Cum. Supp. 1943.

¹⁶ United States Cotton Standards Act, 42 Stat. 1517 (1923), 7 U. S. C. A. §§ 51-65, and United States Cotton Futures Act, 39 Stat. 410 (1916), 26 U. S. C. A. §§ 1920-1935, 7 Code of Fed. Reg. 27, as amended in Cum. Supp. 1944, and 11 Fed. Reg. 4777 (May 2, 1946); and Part 28, as amended in Cum. Supp. 1945.

¹⁷ United States Grain Standards Act, 39 Stat. 482 (1916), 7 U. S. C. A. §§ 71-87, 7 Code of Fed. Reg. 26, as amended in Cum. Supp. 1943 and 11 Fed. Reg. 8711 (Aug. 13, 1946).

¹⁸ Department of Agriculture Appropriation Acts, 43 Stat. 844 (1925), 7 U. S. C. A. § 414, and Agricultural Marketing Act of 1946, 7 U. S. C. A. § 1622; Code of Fed. Reg. 53, and §§ 53.101-53.117 as added by 11 Fed. Reg. 13995, *et seq.* (Dec. 3, 1946).

tobacco,¹⁹ naval stores,²⁰ peanuts,²¹ wool,²² fresh and processed fruits and vegetables, dairy products, and farm products generally.²³ Grading and inspection are mandatory in some cases and optional in others. Quarantine regulations under appropriate statutes are issued in connection with the eradication of insect pests and plant and animal diseases.²⁴ The Second War Powers Act, Title III,²⁵ authorizes the Department, by delegation of authority from the President, to make allocations of agricultural commodities, including food, for defense purposes, but agency action thereunder is subject only to the informational requirements of Section 3 of the Administrative Procedure Act.

¹⁹ Tobacco Inspection Act, 49 Stat. 731 (1935), 7 U. S. C. A. §§ 511-511(q), and Tobacco Stocks and Standards Act, 45 Stat. 1079 (1929), 7 U. S. C. A. §§ 501-508, 7 Code of Fed. Reg. as amended in Cum. Supps. 1944, 1945, and 11 Fed. Reg. 7967, 8712, 13099 (July 24, 1946 to Nov. 5, 1946); and Part 30.

²⁰ The Naval Stores Act, 42 Stat. 1435 (1923), 7 U. S. C. A. §§ 91-99, 7 Code of Fed. Reg. (Cum. Supp. 1943, Part 160) as amended, 11 Fed. Reg. 14665, *et seq.* (Dec. 27, 1946); 12 Fed. Reg. 217 (Jan. 15, 1947).

²¹ 49 Stat. 1898 (1936), 7 U. S. C. A. §§ 951-957.

²² Wool Standards Act, 45 Stat. 593 (1928), 7 U. S. C. A. §§ 415(b), 415(e), 7 Code of Fed. Reg. 31, as amended in Cum. Supp. 1943.

²³ Department of Agriculture Appropriation Acts, 43 Stat. 844 (1925), 7 U. S. C. A. § 414, and Agricultural Marketing Act of 1946, 7 U. S. C. A. § 1622.

Fruits and Vegetables: 7 Code Fed. Reg. 51, as amended in Cum. Supp. 1945, 11 Fed. Reg. 13239, 13565, 13568, 14283, 14665 (Nov. 7, 1946 to Dec. 27, 1946); 12 Fed. Reg. 1 (Jan. 1, 1947); and Part 52, as amended in Cum. Supp. 1943, 11 Fed. Reg. 12124, 12431, 13244 (Oct. 17, 1946 to Nov. 7, 1946).

Creamery Butter 7 Code of Fed. Reg. (Cum. Supp. 1943) Part 63.

Rice: 7 Code of Fed. Reg. 60, as amended in Cum. Supp. 1943 11 Fed. Reg. 9840 (Sept. 7, 1946).

Hemp Line and Tow: 7 Code of Fed. Reg. (Cum. Supp. 1943) 64.

Dried Whole Eggs: 7 Code of Fed. Reg. (Supp. 1944) 65.

²⁴ Insect Pests: 33 Stat. 1269 (1905), 7 U. S. C. A. §§ 141-149; and Plant Quarantine Act, 37 Stat. 319 (1912), 7 U. S. C. A. §§ 151-167. 7 Code of Fed. Reg. 301-302, 319-321, 351-352, as amended in Cum. Supps. 1944, 1945, 11 Fed. Reg. 705, 789, 1201, 2628, 2813, 4081, 4522, 5777, 6387, 6960, 7182, 7651, 9731, 11810, 12923 (Jan. 18, 1946 to Nov. 1, 1946) and Part 323 added by 11 Fed. Reg. 14585 (Dec. 21, 1946).

Animal Diseases: 48 Stat. 528 (1934), 7 U. S. C. A. § 612(a), 37 Stat. 606 (1912), 21 U. S. C. A. §§ 111-130. 9 Code of Fed. Reg. 51-53, 58, 65, 66, 71-77, 81, 91-96, as amended in Cum. Supp. 1944, 11 Fed. Reg. 5855, 6816, 12225 (May 30, 1946 to Oct. 18, 1946), 12 Fed. Reg. 39 (Jan. 3, 1947).

²⁵ 56 Stat. 177 (1942), 50 U. S. C. A. § 633.

The Judicial Officer and the Office of Hearing Examiners.—It will be observed from the preceding review that the Department engages extensively in rule-making and adjudication. Before engaging upon a more extended consideration of a selected few of these activities, a brief description of the manner in which the Department is organized to conduct the proceedings required under its varied regulatory programs may provide a helpful background.

Following the historic Morgan cases²⁶ in which the Supreme Court stated that "he who decides must hear," the so-called Schwellenbach Act²⁷ was passed which authorized the Secretary to delegate to an officer designated by him the regulatory functions vested in him by statute. The Judicial Officer now exercises by delegation of authority the adjudicative powers of the Secretary, and some of the rule-making authority as well. His function in these fields is one of final decision upon hearing before him or upon review of recommended decisions in proceedings subject to the Administrative Procedure Act as well as those specifically exempt therefrom.

In compliance with the segregation requirement of Section 5(c) of the Administrative Procedure Act, a separate and independent Office of Hearing Examiners has been created which is responsible for the conduct of all hearings in connection with formal rule-making or adjudication subject to Sections 4, 5, 7 and 8 of the Act. Where the Department, or one of its bureaus, appears in an advocative capacity it is represented by an attorney designated by the Solicitor. Attorneys from the Solicitor's Office may also serve as hearing officers in informal rule-making proceedings and in other cases set forth in the exceptions to Section 5, such as reparation proceedings

²⁶ *Morgan v. United States*, 298 U. S. 468, 56 Sup. Ct. 906, 80 L. ed. 1238 (1936); 304 U. S. 1, 58 Sup. Ct. 773, 82 L. ed. 1129 (1938); *United States v. Morgan*, 307 U. S. 183, 59 Sup. Ct. 795, 83 L. ed. 1211 (1939); 313 U. S. 409, 61 Sup. Ct. 999, 85 L. ed. 1429 (1941).

²⁷ 54 Stat. 81 (1940), 5 U. S. C. A. §§ 516(a)-516(e).

under the Perishable Agricultural Commodities Act and the Packers and Stockyards Act. Investigatory functions are performed exclusively by investigators, auditors and accountants operating under the direction and supervision of administrative bureaus. Complete segregation of examiners from the prosecutory and investigatory functions has been achieved. It should be observed, however, that the provisions of the Act relating to the appointment and tenure of examiners do not become effective until June 11, 1947.

THE EFFECT OF SECTION 3 ON THE DEPARTMENT OF AGRICULTURE

The informational requirements of Section 3 became effective September 11, 1946. The Department was required to publish on or before that date and to keep current thereafter (1) its central and field organization, (2) the procedures by which its functions are performed, and (3) substantive rules adopted in accordance with law. The organizational statement was required to indicate all final delegations of authority and the places where information could be obtained. The procedural statement was required to indicate the forms required and the general scope and contents of papers, reports, etc., that must be used.

Many of these materials had already been published in some form, but the subjects frequently were not separately stated as now required by the Act. After discussions with representatives of the National Archives and other government agencies for the purpose of adopting a reasonably uniform procedure, the Department decided to publish on September 11, 1946, a completely new statement separately stating the organizational and procedural materials. This statement was prepared with considerable care, and was intended to be as simple and readable as possible in order that it might be of maximum use to the public.²⁸ Consequently, lengthy and detailed rules applicable to particular

²⁸ 11 Fed. Reg. 233-301.

programs were not reprinted in full, but they were identified briefly and cross-references were given to the prior detailed publications.

It has been generally considered that publication of substantive rules (and statements of general policy and interpretations), issued prior to September 11, was not required by the Act. For the most part, however, the Department's rules already appeared in the Code of Federal Regulations, although frequently they combined both substantive and procedural matters. The organizational statement has been amended from time to time as changes have occurred, rules of practice have been revised, and all substantive rules issued after that date have been published. Opinions and orders in the adjudication of cases have for years been published in the *Agricultural Decisions*.²⁹

RULE-MAKING FUNCTIONS OF THE DEPARTMENT OF AGRICULTURE

The definitions of "rule" and "rule-making" in the Administrative Procedure Act are very broad, and include within their scope such a variety of administrative actions of the Department that it is impracticable to discuss all of them in detail. A discussion of each rule-making function is not necessary, however, in order to indicate the effect of the Act.

The informal rule-making process under Section 4 of the Act is applicable in the exercise of the regulatory powers of the Department mentioned above, except those presently discussed as coming within the formal rule-making process of Sections 4, 7, and 8, of the Act considered in combination. The volume of informal rule-making is indicated in the forepart of this paper. It may be observed that the informal rule-making process imposes no serious obstacle in compliance. Three things only are

²⁹ Monthly publication was initiated in January, 1942. Copies are available through the Superintendent of Documents, U. S. Government Printing Office.

required: first, a formal notice of the proposed rule; secondly, an opportunity afforded to interested persons to submit their views either orally or in writing, and thirdly, postponement of the effective date of the rule for a period of not less than thirty days following its publication. It is recognized also that in an emergency the notice cannot be given or that the rule must become effective prior to the expiration of the thirty-day period. The requirements of Section 4 do little more than perpetuate the procedure which the Department has followed in many instances heretofore.

The formal rule-making process prescribed by Sections 4, 7, and 8, considered in combination is applicable to marketing orders issued under the Agricultural Marketing Agreement Act of 1937,³⁰ rate orders issued under the Packers and Stockyards Act,³¹ and market allotments made under the Sugar Act of 1937,³² all of which regulations, as required by the respective acts, may only be issued upon the basis of an agency hearing record.

Marketing Orders under the Agricultural Marketing Agreement Act of 1937.—The Agricultural Marketing Agreement Act of 1937³³ provides for a regulatory system that is in many respects unique. The purpose of the act is to establish orderly marketing conditions for certain named agricultural commodities. Those marketing conditions are intended to establish prices to farmers at a level that will give the commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of the commodities during a specified base period. In order to accomplish the purpose of the act, the Secretary is authorized to issue orders applicable to handlers of the commodity. The act sets forth in detail the purpose of orders, prescribes the manner in which they

³⁰ See Note 8, *supra*.

³¹ See Note 5, *supra*.

³² See Note 10, *supra*.

³³ The act reenacted with amendments the marketing provisions of the Agricultural Adjustment Act, 48 Stat. 31 (1933), 7 U. S. C. A. § 601.

shall be issued, the terms they shall contain, and provides for their enforcement. Provision is made also for administrative relief and judicial review of administrative rulings.

Milk is one of the commodities subject to the provisions of the act, and its marketing is being regulated by orders of the Secretary in twenty-nine milk marketing areas. Each order is regional in application, and its terms are technical.³⁴

Milk orders are designed to stabilize the market for milk by establishing a uniform minimum price which all handlers shall pay producers for milk delivered during the previous month. A typical order with a market-wide pool (the type of order hereafter referred to) provides for the classification of all milk marketed within the area according to its use by the handlers, and a "use value" is assigned to each class. Milk used in fluid form usually has a higher value than milk used in other forms. The individual farmer, however, does not receive the use value applicable to the milk he sells to a particular handler. Instead, each handler reports to the Market Administrator each month the total quantity of milk devoted by him to each classified use, and the total use values for all handlers is divided by the total quantity of milk delivered by all producers to arrive at a blended price to be paid by all handlers to all producers.

However, as use values among handlers will vary with the percentage of milk distributed in each class, the uniform price paid by handlers will create inequities among handlers unless an adjustment is made. This adjustment is accomplished by a producer-settlement fund or equalization pool. If the total uniform price paid by a handler is less than the aggregate use values applicable to the milk handled by him (this would be the case, for example,

³⁴ *United States v. Ruzicka*, ... U. S. ..., 67 Sup. Ct. 207, 91 L. ed. 229 (1946); *Queensboro Farms Products v. Wickard*, 137 F. (2d) 969, 974 (C. C. A. 2d, 1943).

if all the milk handled by him was resold in fluid form), the difference must be paid into the producer-settlement fund. Similarly, if the total uniform price paid by a handler is greater than the aggregate use values assigned to his milk, he may withdraw the difference from the fund. In this manner, each handler is enabled to pay his producers the same price as other handlers pay their producers.

The procedure for issuing a milk order is as follows: Whenever the Secretary believes that the issuance of an order will tend to effectuate the policy of the act, notice is given of a public hearing on the proposed program and at such hearing all interested persons are given an opportunity to be heard. If the Secretary determines upon the basis of the evidence introduced at the hearing that the issuance of the order will tend to effectuate the purpose of the act he makes a finding to that effect. A tentative marketing agreement containing the same regulatory provisions as the proposed order is then submitted to the handlers of milk within the area for signature, and the proposed order is submitted to the producers of such milk for approval. If the handlers of 50% or more of the milk marketed within the area sign the agreement, and if at least two-thirds of the producers or the producers of at least two-thirds of the milk marketed in the area approve the order, it may become effective. The order may also be issued if the necessary approval of the producers is obtained and the Secretary finds, with the approval of the President, that the refusal of the handlers to sign the agreement tends to prevent the effectuation of the policy of the act and that the issuance of the order is the only practicable means of accomplishing that result.

Sections 4, 7, and 8, of the Administrative Procedure Act do not require many changes in procedure. It has always been the practice to publish notice of the public hearing, together with a copy of the proposed order, in the Federal Register, and this conforms with the require-

ments of Section 4(a). Prior to December 11, 1946, a hearing upon a proposed order was conducted by an examiner designated by the Solicitor. Since that date examiners have been designated by the Office of Hearing Examiners. Section 7(b) specifies the powers of hearing officers, but they do not materially differ from the powers previously exercised by such officers. Section 7(c) requires the rule (i.e., the milk order) to be supported by reliable, probative, and substantial evidence in the record. This is intended to be a guide to the agency³⁵ and for purpose of judicial review Section 10(e) states the familiar "substantial evidence" rule. Following the hearing, interested persons are permitted to file proposed findings and conclusions and briefs. The record is then reviewed by dairy and marketing specialists, and a report and a recommended order are issued by an Assistant Administrator of the Production and Marketing Administration to which interested persons may address exceptions. Occasionally there arises, usually in connection with an amendment to an existing order, a need to dispense with the practice of issuing a recommended order. In order to comply with Section 8, the Rules of Practice³⁶ now contemplate that, in such a case after hearing, interested persons may file proposed findings and conclusions and the intermediate decision may be omitted upon a finding by the Secretary that the due and timely execution of his functions imperatively and unavoidably so require. In such situations, Section 4 will also require a minor change in procedure in that the effective date of a milk order must be not less than thirty days after its publication, unless the Secretary, upon good cause, finds that an earlier date is desirable.

The "exquisitely complicated" character of milk regulation has been emphasized by the courts, in litigation involving milk marketing orders, and in *Queensboro Farms*

³⁵ Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) p. 228.

³⁶ 7 Code of Fed. Reg. 900, as amended in Cum. Supp. 1945, 11 Fed. Reg. 7737 (July 13, 1946).

Products v. Wickard,³⁷ the Second Circuit Court of Appeals stated that the milk problem in conjunction with our milk marketing orders "is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry, and medicine, to the niceties of the legislative, judicial, and administrative processes of government." The up and down pattern of milk production in many production areas coupled with rapid changes in economic conditions calls for frequent hearings in order to effectuate the necessary changes in the classification of milk and the specification of minimum prices that handlers shall pay to producers. Economic conditions frequently are such that hearings must be called on minimum notice, and the necessary changes made effective forthwith. A hearing of this type, commonly referred to as a promulgation hearing, has been aptly described by the Seventh Circuit Court of Appeals in *United States v. Wrightwood Dairy Co.*,³⁸ arising under the Chicago milk marketing order:

The object of such a hearing is not only to afford the individuals the opportunity of airing their objections to the proposed scheme of things, but is also to give the administrators the chance of obtaining information which might have been overlooked or otherwise not available to them.

The realities of the situation are clear. In the case of many proposed agreements [and orders], hundreds of people may be present at a hearing and every individual would be equally desirous of insuring the maximum protection of his own interests. If the equivalent of court proceedings were granted to each person, or even to groups, the hearing would be unwieldy and not susceptible to a satisfactory conclusion. Obviously, a more workable balance must be struck between administrative efficiency and the protection of individual rights.³⁹

³⁷ 137 F. (2d) 969, 975, (C. C. A. 2d, 1943).

³⁸ 127 F. (2d) 907, 910, (C. C. A. 7th, 1942).

³⁹ This description of a promulgation hearing is strikingly similar to the explanation by Mr. Edwin G. Nourse, Director of the Institute of Economics of the Brookings Institution in his book, "Marketing Agreements under the AAA" (pp. 34-37). This is a field in which the Department, in seeking the

Sections 7 and 8 of the Administrative Procedure Act require a proceeding of this character to be conducted according to the same criteria specified for adversary or quasi-judicial proceedings. Our experience under the Administrative Procedure Act is insufficient at present to permit our setting forth the problems that may be encountered in this respect. This is, however, a matter of considerable concern to us, inasmuch as the milk marketing orders must be operated with facility and without delay in order to achieve the economic result specified in the Agricultural Marketing Agreement Act of 1937.

Fruits and vegetables, with certain exceptions, are also subject to the provisions of the Agricultural Marketing Agreement Act of 1937, and many marketing orders have been issued with respect to them. The general purpose of the orders is the same as the purpose of milk orders: the establishment of such orderly marketing conditions as will result in the payment to farmers of prices that will give fruits and vegetables a purchasing power equivalent to their purchasing power during the base period. Unlike a milk order, however, a fruit or vegetable order does not fix prices. It may limit the quantity, grade, or size of the commodity that may be handled and apportion the total quantity to be handled equally among producers.

The procedure for issuing a fruit or vegetable order is exactly the same as it is for a milk order, and the foregoing comments with respect to the effect of the Administrative Procedure Act are applicable. In addition, the Act has had one collateral but important effect. Fruit

economic goal set forth in the statute, is not dealing with concrete factors, "but with factors that are extremely intangible, such as different types of economic situations, broad objectives that must be definitized to meet concrete situations, different methods of control, technical methods and procedures, and a variety of relationships." (Hearings before Subcommittee No. 4 of the Committee on the Judiciary on H. R. 4236, H. R. 6198 and H. R. 6324, 76th Cong., 1st Sess. (1939) at 161). The Department expressed its view that a proceeding of this type should not be "classified as judicial in character or amenable to the formalities of procedure which typify judicial proceedings." (Hearings before Subcommittee No. 4 of the Committee on the Judiciary on H. R. 4236, H. R. 6198, and H. R. 6324, 76th Cong., 1st Sess. (1939) at 82).

and vegetable orders frequently contemplate the issuance of volume, grade, and size regulations by the Secretary at weekly or bi-weekly intervals during a short marketing period. For example, an order designed to prevent the premature marketing of Georgia peaches, which experience has shown tends to create unfair competition and a disrupted market, obviously can not specify volume, grade, and size regulations for a marketing season one, two or three years in advance. Those regulations must be issued during the time the crop is ripening and must be made effective almost immediately. Prior to the passage of the Administrative Procedure Act, the necessary data could be compiled and submitted to the Secretary in a comparatively short time and it was customary to issue on a Saturday a rule intended to become effective the following Monday. However, under rules now pertaining to the filing and publication of materials in the Federal Register, a delay is occasioned which necessitates issuance of regulations based upon data that is not as recent as was formerly the case. This can be obviated only in cases where actual notice of a volume, grade and size regulation can be given to the persons affected.

Sugar Quotas under the Sugar Act of 1937.—The Sugar Act of 1937⁴⁰ provides for the establishment of quotas for domestic and foreign sugar producing areas and for the allotment of the area quota among the persons who market or import sugar. Although the quota provisions of the act were suspended by Presidential Proclamation in 1942, because of the emergency created by the war (Proc. No. 2551, April 13, 1942), and are still suspended, they constitute one of the Department's important regulatory programs during normal times.

The Sugar Act directs the Secretary to determine for each calendar year the total amount of sugar needed to meet the requirements of consumers in the continental United States. After that determination has been made,

⁴⁰ See Note 10, *supra*.

the Secretary is required to establish quotas for all sugar-producing areas by allocating the total need of the consumers in the continental United States among continental sugar-producing areas, Hawaii, Puerto Rico, the Virgin Islands, the Republic of the Philippines, and foreign countries. The allocation is determined by percentages set forth in the act. The act then prohibits the importation of sugar or the marketing of sugar in interstate commerce, or in competition with sugar shipped in interstate or foreign commerce, in excess of the quota for the area. If during any calendar year the Secretary determines that a particular area will not be able to market the full quota for the area he may revise the quotas for the other areas by prorating the deficit among them. The Secretary may also allot the quota for any area among the persons who import or market sugar in the area, and the marketing or importation of sugar in excess of the allotment is prohibited.

The determination of the total amount of sugar needed to meet the requirements of consumers and the establishment of quotas for sugar-producing areas are not subject to the formal rule-making provisions of Sections 7 and 8 of the Administrative Procedure Act because they are not required to be made on the basis of a hearing record. They are, however, subject to the informal rule-making process of Section 4. Although the factors to be considered by the Secretary when determining total needs and the exact percentages to be used for establishing area quotas on the basis of total needs are specified in the statute, it will be necessary for him to give notice of proposed rule-making and to afford interested persons an opportunity to submit data or arguments either orally or in writing. In this respect the Act changes previous practice.

But the allotment of area quotas to individuals must be made upon the basis of a hearing record and is, therefore, subject to the formal rule-making process of Sections 7

and 8. These sections, however, require no substantial change in the procedure. As was indicated in the discussion of milk orders, the requirements of Section 4(a), notice of hearing, Section 7(a), qualifications of presiding officer, Section 7(b), powers of presiding officers, and Section 7(c), substantial evidence requirement, are consistent with prior procedures in the Department. As in the case of milk orders, Section 8 will require that interested persons be given an opportunity to submit proposed findings and conclusions or exceptions after the hearing and before a final decision by the Secretary. Section 4 will require the effective date of the allotment of quotas to be not less than thirty days after publication unless an earlier date is found to be necessary.

Rate Orders under the Packers and Stockyards Act, 1921, as amended.—The Packers and Stockyards Act⁴¹ gives the Secretary jurisdiction over packers and stockyards and the operation of market agencies and dealers, engaged in buying and selling livestock at stockyards. The act gives the Secretary similar jurisdiction over live-poultry handlers in certain cities.

In general, the act establishes requirements governing livestock transactions. Services furnished to livestock shippers must be adequate. Charges for stockyard services shall be reasonable. Accurate weighing of livestock is required. Consigned livestock is to be sold under competitive conditions. Commission firms must account fully and correctly to their principals and stockyard companies, market agencies, dealers, and packers shall not engage in unfair, deceptive, or discriminating practices.

Schedules of all rates must be filed with the Secretary. Either upon his own initiative or upon the basis of a complaint, the Secretary may, after a reasonable notice, initiate a hearing to determine the lawfulness of a rate, and a proposed rate may be suspended for not more than sixty days pending the hearing. After a full hearing, the Secre-

⁴¹ See Note 5, *supra*.

tary may prescribe reasonable rates if he determines that the schedule of rates on file is unreasonable. The issuance of rate orders is subject to the formal rule-making process of Sections 4, 7, and 8 of the Administrative Procedure Act because the orders are required to be based upon a hearing record.⁴² The examiner, however, may freely consult rate experts and other qualified administrative personnel in the development of a recommended rate order since under Section 5(c) the principle of segregation in adjudications is not applicable to rule-making.

ADJUDICATORY FUNCTIONS OF THE DEPARTMENT

Adjudications not subject to Sections 5, 7, and 8.—Adjudication is defined as “agency process for the formulation of an order.” An “order” is defined as “the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule-making but including licensing.” The exceptions enumerated in Section 5, however, exclude from the application of Sections 5, 7, and 8 functions which otherwise would fall within this broad definition.

First, many functions exercised by agencies in the Department of Agriculture, such as programs relating to agricultural credit, price supports, subsidies and the management of forest and submarginal lands have never been considered adjudicative in nature and are now exempt from the formal procedural requirements of Sections 5, 7, and 8 by virtue of the provision limiting the application of those sections to cases of “adjudication required by statute to be determined on the record after opportunity for agency hearing.” It has already been noted that they are also exempt from the rule-making process.

The second group of cases, traditionally adjudicatory in

⁴² Although not specifically required by the statute, the rates are determined by the Secretary and reviewed by the courts upon the agency hearing record. *Acker v. United States*, 298 U. S. 426, 434, 56 Sup. Ct. 824, 80 L. ed. 1257 (1936).

nature, which bulk fairly large in the volume of proceedings conducted by the Department, are reparation proceedings under the Packers and Stockyards Act⁴³ and the Perishable Agricultural Commodities Act⁴⁴ which may lead to an award of damages. The Secretary's determination of any matter involved in these proceedings is exempt from the requirements of the Act for the reason that it is subject to a subsequent trial *de novo* in the district court.

Within this exception may also be included hearings authorized by the Capper-Volstead Act.⁴⁵ Pursuant to that act, if the Secretary believes that a cooperative association engaged in processing, handling and marketing agricultural products is monopolizing or restraining trade in interstate or foreign commerce to such an extent that the price of a commodity is enhanced, he may issue a complaint and an order to show cause why a cease and desist order should not be entered. The statute provides that upon judicial review of a cease and desist order issued, after hearing upon the complaint, the findings of the Secretary shall be *prima facie* evidence of facts and that either side may adduce additional evidence. The association, therefore, is assured of a trial *de novo*.

A third category of adjudications which are exempt from the procedural and examiner requirements of the Act are decisions of the Secretary based solely upon inspections and tests. Under the Grain⁴⁶ and Cotton Standards Acts⁴⁷ and the Tobacco Inspection Act,⁴⁸ if a dispute arises as to whether the grade of grain, cotton or tobacco determined by an inspector conforms to the standard of the specified grade, an appeal may be taken to the Secretary who is authorized to cause such investigation and tests to be made as he may deem necessary to determine the true grade. The

⁴³ 42 Stat. 165 (1921), 7 U. S. C. A. § 210.

⁴⁴ 46 Stat. 534 (1936), 7 U. S. C. A. §§ 499(f)-499(g).

⁴⁵ 42 Stat. 388 (1922), 7 U. S. C. A. §§ 291-292.

⁴⁶ See Note 17, *supra*.

⁴⁷ See Note 16, *supra*.

⁴⁸ See Note 19, *supra*.

findings of the Secretary, after hearing, are *prima facie* evidence of the facts in the courts of the United States.⁴⁹ Although the inspection may not be the sole basis for the determination in view of the hearing contemplated by the statute, necessarily it will ordinarily be the chief basis for the decision. The Department also carries on many functions which involve decisions based upon inspections where no hearing is provided by statute. They include certifications by the Secretary that apples and pears tendered for export comply with minimum standards for export grades;⁵⁰ decisions involving seizure and sale of any dangerous caustic or corrosive substance shipped in interstate or foreign commerce;⁵¹ decisions based upon inspections which result in seizure and destruction of contaminated, worthless or dangerous viruses, serums, etc.;⁵² and other similar decisions arising in the administration of laws relating to the eradication of plant and animal diseases.⁵³ In these fields of administrative action, formal proceedings do not serve a very useful purpose and it is recognized that the more important element is the judgment of the inspector.

Adjudications Subject to Sections 5, 7 and 8.—The provisions of Sections 5, 7 and 8 apply to cases of adjudication “required by statute to be determined on the record after opportunity for an agency hearing.” Although the statutes administered by this Department authorizing action of an adjudicatory nature do not as a rule provide specifically that the decision shall be made upon the record of a hearing, provisions for judicial review make quite clear the con-

⁴⁹ 42 Stat. 1517 (1923), 7 U. S. C. A. § 54; 39 Stat. 414 (1916), 7 U. S. C. A. § 78; 49 Stat. 733 (1935), 7 U. S. C. A. § 511(f).

⁵⁰ 48 Stat. 123 (1933), 7 U. S. C. A. §§ 581-589, 7 Code of Fed. Reg. 33, as amended Cum. Supp. 1943 and as revised, Supp. 1944.

⁵¹ Federal Caustic Poison Act (1947), 15 U. S. C. A. §§ 401-411, 21 Code of Fed. Reg. 175.

⁵² 37 Stat. 832 (1913), 21 U. S. C. A. §§ 151-158, 9 Code of Fed. Reg. 101-102, 108-112, 114-121, as amended in Cum. Supp. 1945.

⁴⁸ See Note 19, *supra*.

gressional intent that such shall be the case.⁵⁴ Other statutes contain no reference to decision "on the record" nor any specific provision for judicial review.⁵⁵ The legislative history of the Administrative Procedure Act, however, indicates that where a statute authorizes agency action of an adjudicatory nature after hearing it will ordinarily be implied that the decision shall be based upon evidence adduced at the hearing. Reference has been made to disputes arising out of the grading of grain and certain other commodities in which inspections and tests play a dominant role even though a hearing is provided for. These, however, do not constitute an exception to the general principle above because those statutes also provide that the Secretary's findings shall be only *prima facie* evidence of the facts in any court.

The Department, after the submission of the report of the Attorney General's Committee on Administrative Procedure,⁵⁶ caused to be made comprehensive revisions of its rules of practice with respect to such adjudications as are now subject to Sections 5, 7 and 8 of the Administrative Procedure Act. The revisions attempted to conform these procedures to the suggestions made by the Attorney General's Committee.

Provision was made for prehearing conferences to define and limit the issues in such proceedings. After the hearing, the parties were given an opportunity to file proposed findings of fact and conclusions of law and briefs upon the law and the facts. The examiner or presiding officer was required to issue a recommended decision, and the parties

⁵⁴ See Commodity Exchange Act, 42 Stat. 1001 (1922), 7 U. S. C. A. §§ 9-10; Packers and Stockyards Act, 42 Stat. 161 (1921), 7 U. S. C. A. §§ 193-194; Federal Seed Act, 55 Stat. 1275 (1939), 7 U. S. C. A. §§ 1559-1600; Agricultural Marketing Agreement Act, 52 Stat. 215 (1937), 7 U. S. C. A. § 608(c) (15); Agricultural Adjustment Act, 52 Stat. 62 (1938), 7 U. S. C. A. §§ 1361-1368.

⁵⁵ United States Cotton Standards Act, 42 Stat. 1517 (1916), 7 U. S. C. A. §§ 51-65; United States Grain Standards Act, 39 Stat. 482 (1916), 7 U. S. C. A. §§ 71-87; Viruses, Serums, etc., 37 Stat. 319 (1912), 21 U. S. C. A. §§ 151-158.

⁵⁶ Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941).

were afforded an opportunity to file exceptions and to make oral argument before the Judicial Officer. Cross-examination was permitted. Subpoenas were obtainable upon request of a party with a proper showing. Procedure was prescribed for the taking of depositions. In view of these revisions, the Administrative Procedure Act required only minor procedural changes. The Act, however, provides for a more definite segregation of functions between the presiding officer and employees engaged in investigative and prosecutive functions. Prior to the Act, responsive pleadings were not required by the rules of practice. Now such pleadings are required in all cases.

Section 9(b) of the Act provides that, except in cases of wilfulness or when public safety or health requires a licensee, prior to the initiation of a proceeding for the withdrawal, suspension, revocation or annulment of a license, shall be informed of the facts which would constitute the basis of such proceeding and afforded an opportunity to demonstrate or achieve compliance with all lawful requirements. This procedure has been followed in many instances in the past and is now applicable in all license cases.

The programs under the following acts account for most of the adjudicatory proceedings in the Department:

Packers and Stockyards Act.—The general purpose of this act is to prohibit unfair and discriminatory practices in transactions in livestock at stockyards, and to require just and non-discriminatory rates for stockyards services. The provisions of the act have been extended to transactions of poultry dealers and handlers on designated markets. The act also prohibits packers from engaging in unfair and discriminatory practices. All market agencies and dealers on stockyards posted by the Secretary are required to register with the Secretary. Persons engaged in carrying on the business of a poultry dealer or handler in a market designated by the Secretary are required to obtain a license. The Secretary is authorized to exercise the following adjudicatory functions upon condition that his

action be based upon the record of an agency hearing.

(a) The registration of any market agency or dealer may be suspended, and a cease and desist order may be issued against any market agency or dealer, for failure to render reasonable stockyard service, for engaging in the unfair practices prohibited by the Act, or for charging rates other than those filed with or prescribed by the Secretary.

(b) A cease and desist order may be issued against any packer who has engaged in unfair and discriminatory practice.

(c) A license may be refused to any applicant who within a period of two years has engaged in practices of the nature of the practices prohibited by the Act, or has been responsible for actions which have resulted in the revocation of a license.

(d) A license may be suspended or revoked if the licensee has engaged in a practice prohibited by the Act.

Perishable Agricultural Commodities Act 1930, as amended.—The purpose of the act is to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities, including fruits and vegetables, in interstate or foreign commerce. It seeks to accomplish this by (1) requiring that commission merchants, dealers, and brokers obtain a license, (2) requiring licensees to keep records of transactions, (3) prohibiting improper practices, (4) requiring accounting, (5) and authorizing the investigation of complaints, the issuance of reparation orders, the publication of facts concerning violations and, based on the record made at an agency hearing, the refusal, suspension or revocation of licenses.

Adjudicatory proceedings, subject to Sections 7 and 8 of the Administrative Procedure Act are provided for in connection with the administration of this act. The Secretary may in these proceedings take the following action upon evidence adduced at a hearing:

(a) Refuse to issue a license if he finds that the applicant has previously been responsible in whole or in part

for a violation of the act for which the license of the applicant or a partnership or a corporation in which he had a responsible position was revoked.

(b) Refuse to issue a license if he finds that at any time within two years the applicant has been responsible in whole or in part for any flagrant or repeated violation of Section 2 of the act or has failed to pay a reparation order within the period prescribed.

(c) Refuse to issue a license if he finds that the applicant has within two years engaged in a practice of the nature of the practices prohibited by the act.

(d) Suspend a license for ninety days if he finds a licensee has violated the act or any regulations thereunder, and revoke the license if the violation is flagrant or repeated.

(e) Revoke the license of any person who, after having been given a thirty-day notice, continues to employ in a responsible position any individual who was responsible for any action resulting in the revocation of a license.

Commodity Exchange Act.—The Commodity Exchange Act regulates trading in futures and cash transactions in grain, flax seed, grain sorghums, mill feeds, butter, eggs, Irish potatoes, and wool tops. The act provides for the regulation by the Secretary of Agriculture and the Commodity Exchange Commission (Secretary of Agriculture, Secretary of Commerce and Attorney General) boards of trade, futures commission merchants, brokers and persons dealing on designated markets. The principal features of the plan of regulation are as follows: (1) the designation of board of trades as contract markets with the requirement that all futures trading be conducted on such designated markets; (2) the registration of futures commission merchants and floor brokers; (3) the prohibition of certain types of transactions and practices; and (4) the prohibition of manipulation of prices and cornering of commodities.

The act is administered generally by the Secretary of Agriculture. Adjudicatory proceedings thereunder are

conducted by the Commission where a board of trade is a party and by the Secretary in all other cases.

An applicant for designation as a contract market must demonstrate compliance with the conditions enumerated in the act. If, however, the Secretary refuses to designate the applicant as a contract market, an appeal may be taken to the Commission and thence to the Circuit Court of Appeals. The act does not specifically require the Secretary to grant the applicant a hearing nor does it specifically provide for one before the Commission. The requirement of a hearing before the Commission, however, seems implicit.

The Commission may suspend for not to exceed six months or revoke the designation of any board of trade as a contract market if, upon hearing, it is shown that it has failed to comply with the requirements of the act or is not enforcing the rules of the board. Whenever any board of trade, or any officer or employee of such a board, is violating or has violated the act, the regulations or any authorized order the Commission is authorized to issue a cease and desist order after hearing.

The act forbids a board of trade to exclude from membership and trading privileges any cooperative association of producers, lawfully organized and financially responsible, which complies with the terms and conditions applicable generally to other members of the board. This gives rise to a distinctly different type of adjudication by the Commission, and one in which the government does not appear as an advocate. It arises upon the complaint of a board of trade seeking authority to exclude such an association. After hearing, the Commission may authorize the board to exclude the cooperative, or prescribe that the cooperative shall retain its membership conditionally or unconditionally as the facts may justify.

The Secretary is empowered to suspend for not to exceed six months or revoke the registration of a commission merchant or floor broker, and deny trading privileges to

any persons, upon proof adduced at a hearing, of violations of the act or regulations.

Agricultural Marketing Agreement Act of 1937.—The intricate regulation under this act has been explained in connection with rule-making. Under Section 8c(15)(A) handlers may file a petition with the Secretary challenging the validity of an order, any provision thereof, or any obligation imposed thereunder. The statute provides that the pendency of such petition shall not impede, hinder or delay an action brought under Section 8a(6) to enforce the obligation.

Before the enactment of the Administrative Procedure Act, a high administrative official reviewed petitions filed with the Secretary and, if deemed insufficient for failure to state a claim, the petition was dismissed with the approval of the Solicitor but without prejudice to the filing of another petition. If deemed sufficient, the matter would be noticed for hearing. Now all petitions are entertained but if deemed insufficient may be attacked by motion to dismiss.

Farm Marketing Quotas.—Under the Agricultural Adjustment Act of 1938,⁵⁷ the Secretary is required when supplies are excessive to establish farm marketing quotas for basic agricultural commodities. If, for example, quotas for cotton are proclaimed by the Secretary and approved by farmers, a national allotment in terms of bales is apportioned among the states upon the basis of a statutory formula. The state baleage allotment is then converted into acres and apportioned among the counties on the basis of the acreage planted to cotton during the five years immediately preceding, with certain adjustments. The county acreage allotment is then apportioned, through local committees of farmers, to the farms in the county in accordance with standards prescribed by statute. The farm marketing quota consists of the number of bales equal to the normal production or actual production,

⁵⁷ See Note 9, *supra*.

whichever is greater, of the farm acreage allotment plus the number of bales of quota cotton carried over from the preceding marketing year.

Written notice of the acreage allotment and marketing quota established for the farm, together with a statement of the procedure relating to a review thereof, is given by mail. Any farmer, who is dissatisfied with his farm marketing quota, may, within 15 days after the mailing of the notice of the quota, have such quota reviewed by a review committee of three farmers appointed by the Secretary. The statute does not prescribe the procedure to be followed by the review committee, and in the past such hearings have been conducted in accordance with rules issued by the Secretary. The participation in hearings has been somewhat informal in nature, and farmers have usually presented their cases without the aid of counsel. The statute⁵⁸ provides that, if the farmer is dissatisfied with the determination of the review committee, he may file a bill in equity in the United States District Court against the review committee as defendant, or institute proceedings for review in any court of record of the state, sitting in the county where his farm is located, for review of the decision. The review is limited to questions of law, and the committee's decision is conclusive if supported by substantial evidence. The court may remand the case to the review committee for the taking of additional evidence, and the committee may thereupon file modified findings if the additional evidence justifies such action.

This proceeding has unique features. The tribunal is a committee of farmers which presides in lieu of a Section 11 examiner. There is no superior administrative officer or tribunal. A proceeding before the review committee is now subject to the provisions of Sections 5, 7, and 8, except that it constitutes a specific exception to the provisions of Section 7 relating to presiding officers and to those provisions of Section 8 relating to decisions by subordinates.

⁵⁸ Stat. 62 (1938), 7 U. S. C. A. §§ 1361-1368.

Although such a tribunal is "expert" in the subject matter within its jurisdiction, adherence to formal rules of procedure required by the act may present greater difficulties than ordinarily are experienced in other types of proceedings.

JUDICIAL REVIEW

Section 10 of the act provides that any person suffering legal wrong, or, because of any agency action, adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to a judicial review except insofar as (1) the statute precludes judicial review or (2) the action complained of is by law committed to agency discretion. With respect to these exceptions, the House Report states:

To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. . . . Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers.⁵⁹

The instances in which Congress has specifically precluded judicial review are rare. One such case has been discovered in statutes administered by this Department. The Packers and Stockyards Act provides that the Secretary may, upon written application, authorize the charging and collection, at a stockyard subject to the act, by a department or agency of the state or an organized livestock association, of a fee for the inspection of brands. The statute further provides that the Secretary's decision as to the applicant best qualified shall be final, and if he

⁵⁹ House Rep. No. 1980, 79th Cong., 2d Sess. (1946) at 41. See *United States v. Ruzicka*, U. S., 67 Sup. Ct. 207, 91 L. et. 229 (1946).

deems it to be in the public interest, he may suspend and, after hearing, revoke any such authorization and registration and his order "shall not be subject to review."⁶⁰

Many statutes, however, explicitly provide for review and define the court, its jurisdiction, and frequently the procedure to be followed. To illustrate: The Packers and Stockyards Act provides for review by a statutory three-judge court of orders against market agencies and dealers and by the Circuit Court of Appeals of orders against packers.⁶¹ The Commodity Exchange Act provides for review by the Circuit Court of Appeals of the decisions of the Secretary and of the Commission.⁶² Appeals from decisions of the Secretary with respect to allotments of sugar under the Sugar Act⁶³ may be taken only to the Court of Appeals for the District of Columbia. Decisions in proceedings involving the validity of marketing orders and farm marketing quotas are reviewable by the United States district courts and as to quotas, also by the state courts.⁶⁴ Other statutes contain similar provisions.⁶⁵ In contrast, the United States Warehouse Act is silent with respect to the review of a decision of the Secretary revoking the license of a warehouseman or an inspector.⁶⁶ Statutes requiring licenses as a condition of acting as an inspector, etc., or permits or certificates as a condition to the import or export of designated commodities usually do not provide for judicial review.⁶⁷ The absence of any

⁶⁰ 56 Stat. 372 (1942), 7 U. S. C. A. § 217(a).

⁶¹ 42 Stat. 162 (1921), 7 U. S. C. A. §§ 194, 216-217.

⁶² 42 Stat. 1001 (1922), 7 U. S. C. A. § 8.

⁶³ 50 Stat. 906 (1937), 7 U. S. C. A. § 1115(b)-(e).

⁶⁴ 49 Stat. 753 (1933), 7 U. S. C. A. § 608(c)(15)(B); 52 Stat. 63 (1938), 7 U. S. C. A. §§ 1365-1366.

⁶⁵ Federal Seed Act, 53 Stat. 1287 (1939), 7 U. S. C. A. § 1600.

⁶⁶ 39 Stat. 486 (1916), 7 U. S. C. A. §§ 241-273.

⁶⁷ United States Grain Standards Act, 39 Stat. 482 (1916), 7 U. S. C. A. §§ 71-87; United States Cotton Standards Act, 42 Stat. 1512 (1916), 7 U. S. C. A. §§ 51-65; Tobacco Inspection Act, 49 Stat. 731 (1935), 7 U. S. C. A. §§ 511-511(q); Department of Agriculture Appropriations Act, 43 Stat. 844 (1925), 7 U. S. C. A. § 414; Agricultural Marketing Act, 60 Stat. (1946), 7 U. S. C. A. Supp. 1622; Tobacco seed and plants, 54 Stat. 231 (1940), 7 U. S. C. A. §§ 516-517; Apples and pears, 48 Stat. 123 (1933), 7 U. S. C. A. §§ 581-589; virus, etc., 37 Stat. 832 (1913), 21 U. S. C. A. §§ 151-158.

provision for judicial review is not in itself an indication that judicial review is to be denied.⁶⁸

Although judicial review has been specifically denied by statute in but one instance, numerous decisions in whole or in part are committed by law to the Secretary's discretion. Chief among these are decisions made in the course of the administration of programs relating to loans, grants and benefits, or the denial of a license, certificate or permit where such is required as a condition to importing or exporting a commodity. For example, the determination of compliance with the practices established as a condition to participation in benefit payments under the soil conservation programs of the Department, or the discretion exercised in terminating the privilege of grazing on public lands, would seem to fall within the second exception in Section 10. The courts also have held that in the regulation of the marketing of milk and fruits and vegetables there are some determinations that are within the discretion of the Secretary and nonjusticiable.⁶⁹ They include the determination as to whether the basis for the classification of milk according to use in a particular area shall be according to "form" or "purpose";⁷⁰ the definition of the limits of the marketing area and the determination of the base period for ascertaining the purchasing power of milk.⁷¹ Similarly it has been held that the Secretary's determination of the parity price for an agricultural commodity insofar as price control under the Emergency Price Control Act is concerned is not subject to review.⁷² Instances might be multiplied.⁷³

⁶⁸ H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) p. 41.

⁶⁹ *Stark v. Wickard*, 321 U. S. 288, 310, 64 Sup. Ct. 559, 88 L. ed. 733 (1946).

⁷⁰ *Queensboro Farms Products v. Wickard*, 137 F. (2d) 969, 977 (C. C. A. 2d, 1943).

⁷¹ *United States v. Wrightwood Dairy Co.*, 127 F. (2d) 907, 911, 912 (C. C. A. 7th, 1942).

⁷² *California Lima Bean Growers Assn. v. Bowles*, 150 F. (2d) 964, 968 (U. S. Emerg. Ct. of Ap., 1945).

⁷³ Determination by the Secretary of the number of inspectors to be assigned to a market under the Tobacco Inspection Act, 49 Stat. 731 (1935), 7 U. S. C. 511-511(q), *Greer v. Cline* 148 F. (2d) 380, 384 (C. C. A. 6th, 1945). A

With respect to the scope of review, many of the statutes specifically provide that review shall be upon the basis of the record made before the Secretary and limited to questions of law.⁷⁴ The Act does not change the established principle that the decision shall not be disturbed if it is within agency jurisdiction and is supported by substantial evidence.

Two cases arising under the Agricultural Marketing Agreement Act deserve mention in passing. In *Stark v. Wickard*⁷⁵ the Supreme Court held that producers, who are adversely affected or aggrieved by the operation of a milk order to which they are not subject, may resort to equity for redress despite the fact that the statute does not specifically so authorize but on the contrary provides an administrative forum open only to handlers.

More far-reaching in effect insofar as administration of the Agricultural Marketing Agreement Act is concerned, is *United States v. Ruzicka*,⁷⁶ in which the question of the scope of review in an action brought to enforce compliance by a handler with the provisions of the Chicago milk order was involved. The Supreme Court held that in such an action the handler could not contest the market administrator's determination of the amount owing to the producer settlement fund, but must pay it and resort to the administrative remedy provided by the statute. Considering the act in its entirety the Court concluded that Congress has evidenced an intention to withhold review

district court has held that the Secretary's refusal to postpone the operation and effect of a milk order under § 10(d) of the Administrative Act was not reviewable. *Avon Dairy Co. v. Eisaman* (D. C. N. D. Ohio, Dec. 20, 1946—unreported).

⁷⁴ 42 Stat. 162 (1921), 7 U. S. C. A. § 194; 56 Stat. 85 (1942), 7 U. S. C. A. § 608(c)(15)(B); 55 Stat. 1287 (1934), 7 U. S. C. A. § 1600; 52 Stat. 63 (1938), 7 U. S. C. A. § 1366.

⁷⁵ 321 U. S. 288, 64 Sup. Ct. 559, 88 L. ed. 733 (1944).

⁷⁶ ...U. S. ..., 67 Sup. Ct. 207, 91 L. ed. 229 (1946). This case may have a significant bearing upon the interpretation of the last sentence of § 10(b) that "Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

of such an issue in an enforcement proceeding. The Court emphasized that prompt compliance is essential to successful regulation. The remission of the handler to the administrative forum for relief means that the handler must show that the market administrator's determination was erroneous and may attain judicial review of an adverse ruling. In the judicial review, the substantial evidence rule would be applicable.

CONCLUSION

It is too early to essay the full effect of the Administrative Procedure Act upon the regulatory activities of the Department. That must await more experience and perhaps also judicial interpretation. Even at this early stage, however, one may venture a few conclusions with reasonable certainty.

The increased burden upon the Department is attributable largely to the requirements of Sections 3 and 4. The increase in the volume of matter required to be published is great and will entail much additional work in its preparation. From it will accrue certain beneficial results. Not only will be the public be better informed concerning the functions of the Department, but greater care will be exercised in organization, particularly with respect to delegations of authority and the channeling of functions. The Act has generated an alertness to the need for more careful delineation of policies and procedures.

As far as the rule-making process is concerned, it has been common practice to consult industry groups and other persons known to be interested in the development of rules. The act will assure broader participation in this function and opportunity for presentation of the views of all groups. The chief impact has been upon the development and issuance of marketing orders. In that area, the questions arising most frequently relate to the application of the term "rule" to decisions of the agency selected by the Secretary to administer the order.

In the discharge of the Department's adjudicatory functions, relatively minor changes in practice have been required. Those adopted look toward more uniform practices in the conduct of the various proceedings authorized by statute, the simplification of issues, and the expediting of cases. More objective and better informed judgments are likely to result. A substantial increase in the amount of litigation arising out of the Department's regulatory activities is anticipated as a result of the Act.

Finally, the act quickens our sense of responsibility toward the achievement of sound government. In the Department of Agriculture, every effort is being made to conform fully with the letter and spirit of the law.

DISCUSSION PERIOD

FEBRUARY 6, 1947

The Session Convened at 3:30 p.m.

QUESTION: I might make a statement that is interesting in connection with Mr. Hunter's talk. My name is Frank B. Lent. I want to point out that under the informal rule-making provisions of the Act, there may be oral views submitted by the industries as well as written views. In a recent instance of informal rule-making under the Marketing Agreement Act of 1937, we did have a procedure whereby oral views were submitted. They did not call it a hearing; they did not call it anything except a proceeding. But it was called on formal notice and oral views were submitted. You perhaps overlooked that in your statement, Mr. Hunter.

MR. HUNTER: No, I did not overlook that particular instance. What I say is I do not think the Act requires a hearing of that type. We did give it.

QUESTION: Yes, it worked very well.

MR. HUNTER: Any other questions? I am sure there are a lot of questions. I heard a lot of them asked tonight.

QUESTION: Mr. Hunter, my colleague here does not want to ask this question, so I will read it. Have all formal rulings been published? Have any informal rulings of the Department been published?

MR. HUNTER: Yes, all rulings must be published whether formal or informal.

QUESTION: Well, has there been any publication of previous informal rulings—

MR. HUNTER: I do not mean rulings; I mean rules. I think there is a difference between "rulings" and "rules."

QUESTION: What about the informal rulings which have been made in the past? Is it the intention of the Department to publish those?

MR. HUNTER: I do not think so.

QUESTION: Is it not required under the A. P. A.?

MR. HUNTER: No. I make a distinction in my own mind. I do not know whether you are doing the same thing or not. There is a difference between "rule" and "ruling." We may write a letter ruling on something about a rule. Are you speaking of decisions or interpretations, or things of that sort, or are you speaking of the rule itself?

QUESTION: Something along the lines of the trade correspondence under the Federal Food and Drug Act. Those are usually published, but I do not know whether they are published universally—every one of those T. C.'s. Is there something in your Department similar to that—letters of interpretations of rulings? The views that your Department will take on a particular rule? And, if that kind of correspondence is carried on, do you think it is necessary under this new law to make publication of that?

MR. HUNTER: I think that Section 3(a) requires publication of many determinations of that sort. It says, specifically, does it not: ". . . substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public"?

QUESTION: Has there been any plan yet to effect some kind of a uniform method of publishing that kind of interpretative communications, and how will it be done? Is there some plan for uniform procedure in the Federal Register or separate pamphlets?

MR. HUNTER: They will be published in the Federal Register as required by this section.

QUESTION: Then, Mr. Hunter, it must be assumed that there have been no interpretative rulings since the Act was passed last June?

MR. HUNTER: I do not think there have been, as a matter of fact.

QUESTION: Mr. Hunter, I am Mr. Markel. I happen to be the next speaker, but I think perhaps I can clarify this question a little. In the past two or three months, there have been thick Federal Registers that have carried various things in compliance with Section 3 of the Administrative Procedure Act. And there have been published there, in that connection, these various items—(1), (2), (3). Three categories are specified in Section 3, and (3) includes such informal opinions unless they have heretofore been published—at least it is my notion, my construction of the Act. They must now be currently published so that if we have not been able to find them in the past, we shall be able to find past informal rulings in the future.

I presume that the Department of Agriculture, in compliance with Section 3, has published something; weren't some past informal opinions which had not been published included?

MR. HUNTER: We did not publish any issued in the past. Neither did we publish the past substantive rules.

The Act does not require opinions and orders in adjudication to be published in the Federal Register. It does require them to be made available by the Department for public inspection.

QUESTION: This discussion has a matter of immediate moment to me as to what constitutes the ruling that has to be published and what constitutes an advice and what constitutes a statement of the proposed application of a rule already made to a particular state of facts. We have some very fine borderline distinctions in that connection.

For example, a letter to a Market Administrator asking how milk would be classified if it was handled and moved in a certain way, asking him in advance, would, to my mind, not be either an opinion or a rule, and would not need to be published under Section 3 of the Act.

Some people might call it an interpretation. Possibly it is an interpretation, if, by "interpretation" is meant the routine application of a general rule to a particular circumstance as they come up many times every day. I have not any question to ask, or direct conclusion to point out, but I do want to call attention to these borderline fields between what might be called advice, opinion, interpretation, statement of application, and ruling. I think any discussion along that line would be very helpful to all of us.

MR. HUNTER: I am not so sure we may not have to await time and experience to find out the full meaning of all of that. I do think, however, as I stand here, that it does not mean the answer to every inquiry that may come across your desk. Anyway, I hope not. It especially excepts: "... but not rules addressed to and served upon named persons." I do not know what that means. I guess some statute might require that. But I think it means when this agency issues a rule and then issues a general interpretation as to what the public may be guided by, it must

publish that interpretation. A marketing order issued by the Secretary may authorize the Market Administrator to issue interpretative rules and regulations. These interpretative rules are issued pursuant to an informal rule-making process but actually in many cases the hearing is rather formal. These rules and regulations for the general guidance of the public are required to be published, but I do not think that it was the intent of the Act to require that every reply by the Market Administrator to an individual handler's inquiry should be published. You could bring that into perfectly absurd operation. I do not suppose a day goes by that we do not answer literally hundreds of inquiries of some sort about regulations. I do not think it was meant to overload publication.

Let me say this: When it came to publishing this material on September 11th, our Department could have gone out and published so much that nobody in the world would have been able to read it in ten years' time. We could have published all old standards that have been in effect for years. We decided that would defeat the purpose of the Act. Nobody would ever be able to find anything if we published all of that stuff, and I think the Attorney General's office agreed that that was not required at all. We just did not want anybody to get the impression we were trying to overdo this thing and, by overdoing it, make it useless.

Are there any other questions?

QUESTION: Mr. Hunter, it is my understanding that prior to A. P. A., the Department of Agriculture engaged in what you might call informal adjudication without going through the administrative process of adjudicating a controversy. Is it your understanding that there is anything in the A. P. A. which will prevent the informal adjudication?

MR. HUNTER: No, I do not think so.

QUESTION: Will the informal adjudication be recognized in any part of the rules or practice in the Department?

MR. HUNTER: The formal adjudications as contemplated by the Act are those which are required by some other statute, not this one, to be based upon an agency hearing record. That is the only formal adjudication which can take place. It is not provided for by this Act, but is merely recognized by it. It must be provided for by some other Act.

QUESTION: I have in mind an informal adjudication.

MR. HUNTER: This Act recognizes many types of informal adjudication. But there the court, in its review, may have no record, or, if it has one, may not be bound by it. Especially excepted from the operation of Section 5 where they prescribe the procedure for process of adjudication in the agency are various types of hearings where the court can pass on the question *de novo*, and proceedings in which decisions rest solely on inspections. They are excepted from the operation of formal requirements. So far as review by the court is concerned, the Act makes almost every agency action, except those that rest solely within the discretion of the administrative agency, open to judicial review.

What interests me is that we have a situation—perhaps there is some reason for it—where another statute provides that the agency shall make this ruling or adjudication on the basis of some record—and only on that basis, and the court, in reviewing it, shall abide by the record and pass only on questions of law—that is applicable to the regulatory programs as a rule. You hardly find that in any other kind of program. There the court has to take the administrative finding, has to abide by the administrative decision, unless it can find it was arbitrary or capricious, or beyond the statutory authority, or not supported by substantial evidence. Yet in non-regulatory programs under this Act (even apart from it, perhaps) adjudications

by an agency which are not required by any statute to be based upon a record, or even be the result of a hearing, are, nevertheless, subject to judicial review, and the court can take new evidence and try the whole case *de novo*. Therefore, we have a situation where, as to most regulatory statutes, the court cannot try the case *de novo*, while as to most non-regulatory matters, it can. That seems to be a little lopsided but perhaps it is necessary in order to make the thing go.

Have I made that clear now?

QUESTION: Yes, thank you.

MR. HUNTER: It has always been true, for that matter, but it is brought out here.

QUESTION: I was very much interested in Mr. Hunter's comment on the change in cross-examination rights in rule-making hearings, particularly under milk orders. That fits in with his quotation from the opinion of the 7th Circuit Court of Appeals.

In my own experience in the conduct of milk order hearings, and based on that experience, I would not think that the act has anything in it which will prevent the hearing master from controlling cross-examination, just as he has been doing before the Act. If there has been some experience that I am not aware of in some other jurisdiction which would change my conclusion in that connection, I would be very glad to learn of it, because at the time the Act was being drafted some of us who were interested in it and who tried to get in some modification of the full right to cross-examination did so with some success, and I am anxious to know if there has been any interpretation.

MR. HUNTER: No, I do not think we have had a single hearing under the new Act.

QUESTION: There is a series coming up.

MR. HUNTER: Some coming up very shortly.

I might say, also, gentlemen, that, as you know, the examiner provisions of the Act go into effect June 11th. The Civil Service Commission is working hard on that. But our Department was obliged to observe the injunction (Section 5(c) I think it is), relating to adjudication, about segregation. Our examiners must be free from supervision by anybody who is engaged in or has charge of investigatory or prosecutive functions. I insisted that we should set up—and it had to be done—a separate examining unit out from under my control. That has been done. Examiners have been set up in a separate unit, entirely outside of my office. I have no control over them whatsoever, and they will preside in the adjudication hearings where segregation is required. Inasmuch as those hearings run hand in hand with the promulgation hearings, they will also preside over them where segregation is not required.

But, on June 11th, examiners appointed under the Act will do that work, and I think that the examiner provisions themselves required that the Department should effect this principle of segregation now insofar as it can possibly be done.

People on the outside get the idea that, well, what is the use of arguing the case before a departmental official; he just goes back there and talks to everybody and I don't know what is going on. Those people do not know how things were run. I remember when I came to Washington. There was no Administrative Procedure Act to provide segregation, but nobody spoke to anybody, anyway. It is getting a little better since that time. However, you do not realize how we argue about these things; how we differ amongst ourselves. We have some very heated arguments. And it is just not "Me, too" stuff by any means in any office in Washington, so far as I know. Certainly not in my Department. When my office gets in that state, I want to leave it. I want to see them fight over things down there and get the proper result and argue all they please.

QUESTION: Did your examiners join the examiners' association that has been having all these meetings, Mr. Hunter?

MR. HUNTER: I do not think so.

QUESTION: There was something said about it previously in this Institute. That is the reason I raised the question.

MR. HUNTER: I happen to be on the Advisory Committee for the Civil Service Commission. I have not been able to attend all the meetings, but I have been represented there. Then there seemed to be an organization of examiners in Washington that I did not know anything about. They have had a meeting and want to be heard and will be heard, I suppose on broad matters. I did not know there were so many examiners until I went to that meeting.

QUESTION: Mr. Hunter, from time to time, there has been discussion among those interested as to whether or not administrative agencies established under marketing agreements and orders are agencies within the meaning of the term "agency" as it is used in A. P. A. Do you have any opinion on that now?

MR. HUNTER: That has been talked about a good deal. What we think, and I think what Congress had in mind there, was that perhaps some agency had been a semi-independent agency that just happened to be attached to an executive department. But not agencies within the Department. Otherwise, you simply break down to the point where you would not have anybody but an agency. Everything would be an agency. I would be one myself.

QUESTION: Well, is it going to depend, looking now only with respect to those agencies administering market agreement orders, upon the functions which they perform in determining whether or not as to each particular occasion they are agencies under A. P. A.?

MR. HUNTER: They are agencies of the department, cer-

tainly, so far as the definition of agencies under A. P. A. goes. However, when you come to the presiding officer—is that what you are thinking about?

QUESTION: No.

MR. HUNTER: It means each authority. I think that means everything in the government.

QUESTION: He wants to know: Is each market administrator an agency?

MR. HUNTER: Certainly. I think anything the government does through any agency of any sort, corporate or otherwise, comes under the provisions of this Act. I do not see any exception.

QUESTION: Mr. Hunter, would you please again review, if you have already done so, the requirements for a formal and an informal procedure? Show us the difference in the mode of requirement, or the particular requirements that are necessary in each case. I did not quite get the distinction.

MR. HUNTER: Unless the statute itself (some other statute, not this one), requires that the rules should be based upon the agency hearing record the informal procedure mentioned in the Act requires that you must at least give notice that you are going to make the rule; give an opportunity for those who are interested to informally participate in it by writing letters or memoranda to you.

The formal rule-making enters where some other statute (not this one, but one which is recognized by this statute), requires you to base that rule upon evidence taken at a formal hearing, just like a court hearing.

Now, then, the rule-making process prescribed by the Act does not relate to procedural rules—just to substantive rules. Nor does it relate to these non-regulatory programs where you are dealing with public property, making loans,

granting benefits, or things of that sort. In that respect, I say, it leaves it about where it was before.

QUESTION: An example that you would recognize as an informal rule-making would be a suspension of the provision of milk marketing order by the Secretary.

MR. HUNTER: That is a very good example.

Here is another one; under the Farm Marketing Quota Act. All these regulations relating to wheat quotas, cotton, are informal. The statute does not require them to be based upon a record. Yet they are very extensive regulations; the most minute regulations you have ever read.

QUESTION: Another example of the most informal rule would be one that you cannot smoke in here, Mr. Hunter.

THE IMPACT OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT ON THE FEDERAL FOOD, DRUG, AND COSMETIC ACT

MICHAEL F. MARKEL

The statute which we are about to consider concerns itself with commodities which are the means for maintaining the life, health, and comfort of man and other "animals." It deals with foods, drugs, cosmetics, and devices—devices meaning all sorts of gadgets from baby bottle nipples on through health belts, hair growers, and dental plates. It is readily apparent, therefore, that regulatory problems under such a statute are varied and many. We are to consider the impact, if any, of the Federal Administrative Procedure Act,¹ to which I shall refer as "S 7," on the procedures presently in effect in promulgating the various regulations authorized or required for the effective enforcement of the Federal Food, Drug, and Cosmetic Act,² to which I shall refer as the "act."

As I understand the question, I am to point out to you the changes, if any, which are required to be made by reason of S. 7 in the existing administrative procedures for the promulgation of regulations authorized or required by the act. The answer is that no significant changes are required. I shall endeavor to demonstrate this in some detail. However, before I do so I will briefly explain this statute for the benefit of those of you who may not be familiar with it, since, according to the program, I understand I am to assume familiarity with S. 7 but not with the Act.

The Federal Food, Drug, and Cosmetic Act, although enacted by Congress as a complete Act in 1938, is really

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¹ 60 Stat. 237 (1946), 5 U. S. C. A. ch. 19.

² 52 Stat. 1041 (1938), 21 U. S. C. A., §§ 321 et seq.

not a new act since the 1938 act is nothing more than an extension and improvement of the Food and Drug Act of 1906.³ Some of the principal improvements in the 1938 act consist of provisions which experience in the administration of the 1906 act had shown to be necessary for a fuller realization of the objectives of this kind of legislation.

The act is a consumer's statute. Its object is to protect consumers' health and to protect them against fraud. It is calculated to insure label honesty and content purity of foods, drugs, and cosmetics; or, in the language of the Congressional Committee, "to protect consumers' health and pocketbooks."⁴

The law accomplishes this by regulating the shipment of foods, drugs, cosmetics and devices in interstate commerce. Such of these commodities as are unsafe, or filthy, or have been prepared under unsanitary conditions so they may have become filthy, or have been diluted, are declared "adulterated."⁵ Those which are dishonestly labeled or packaged are declared to be "misbranded."⁶ Adulterated and misbranded commodities may not be shipped in interstate commerce. Any person shipping them or doing any of the prohibited acts in connection therewith, is guilty of a misdemeanor and, on conviction, punishable by fine or imprisonment or both.⁷ Any act of causing articles to become misbranded after shipment in interstate commerce and while such article is being held for sale is also subject to these penalties.⁸

The law also provides for the apprehension and destruction of articles by prescribing an *in rem* proceeding, much like admiralty proceedings, whereunder they may be seized

³ 34 Stat. 768 (1906), 21 U. S. C. A. § 1.

⁴ Sen. Commerce Comm. Rep. No. 493, 73d Cong., 2d Sess. (1934); Rep. No. 361, 74th Cong., 1st Sess. (1935); Rep. No. 2139, 75th Cong., 3d Sess. (1938).

⁵ 52 Stat. 1046 (1938), 21 U. S. C. A. § 342.

⁶ 52 Stat. 1047 (1938), 21 U. S. C. A. § 343.

⁷ 52 Stat. 1043 (1938), 21 U. S. C. A. § 333.

⁸ 52 Stat. 1042 (1938), 21 U. S. C. A. § 331(k); *United States v. Sullivan*, 67 F. Supp. 192 (D. C. M. D. Ga., 1946—appeal pending).

and destroyed, or otherwise disposed of in conformity with the law, if they are adulterated or misbranded when introduced into or while they are in interstate commerce.⁹ Whether articles which become adulterated or misbranded while held for sale after shipment in interstate commerce might be seized under this section remains an unsettled question as of this date. The Circuit Court of Appeals for the 9th Circuit has said not,¹⁰ but the petition for certiorari is now pending before the Supreme Court.

The statute further authorizes restraining the commission of certain of the specified unlawful acts, by judicial decree.¹¹

The criminal, seizure, and injunction proceedings instituted in the enforcement of the statute, are required to be brought by and in the name of the United States.¹² The United States District Court is the forum in which the issues of these proceedings are resolved; and the United States attorney is the government official who is empowered to initiate and prosecute those proceedings.

This sounds as though we were discussing a criminal law rather than a statute of the kind which ordinarily comes to mind when questions of administrative procedures are discussed. Well, we are in a sense. The Food, Drug, and Cosmetic Act is basically a penal statute. However, this does not mean that the functions of its Administrator are merely policing functions.

When we consider the magnitude of the collective industry which directly touches the daily lives of every man, woman and child, and the innumerable problems the production and distribution of the diverse affected commodities pose, it becomes readily apparent that no bill could be written for Congressional enactment which would be adequate for effective regulation so as to attain the legis-

⁹ 52 Stat. 1044 (1938), 21 U. S. C. A. § 334.

¹⁰ *United States v. Phelps Dodge Mercantile Co.*, 157 Fed. (2d) 453 (C. C. A. 9th, 1946).

¹¹ 52 Stat. 1043 (1938), 21 U. S. C. A. § 332.

¹² 52 Stat. 1046 (1938), 21 U. S. C. A. § 337.

lative objective of this law. This can only be accomplished through an agency which has adequate authority to promulgate such regulations as may be required from time to time, not only for the efficient enforcement of the act, but also for the aid and guidance of the regulated industry. It is well recognized by those who are familiar with the enforcement and administrative activities of this law that the excellent degree of compliance with its provisions is achieved primarily through the issuance of appropriate regulations, both formal and informal, rather than through seizures and prosecutions. Therefore, the Administrator's policing functions are secondary to his powers to issue regulations.

Before considering the impact of S. 7 on the present procedure followed by the Administrator in issuing regulations, I shall briefly consider his power to issue them and the limitations contained in the statute upon the exercise of that power.

Section 701¹³ of the act entitled "Regulations and Hearings," provides in paragraph (a)—

The authority to promulgate regulations for the efficient enforcement of this act, except as otherwise provided in this section,¹⁴ is hereby vested in the Administrator.

Paragraph (c) provides—

Hearings authorized or required by this act shall be conducted by the Administrator or such officer or employee as he may designate for the purpose.

Section 701(a) is the sole authority for issuing interpretive and advisory regulations. Authority for issuance of substantive regulations which implement the statute is derived from the express authorizations contained in the respective sections as well as from Section 701(a). The

¹³ 52 Stat. 1055 (1938), 21 U. S. C. A. § 371.

¹⁴ This exception refers to the provision in paragraph (b) authorizing the Administrator and the Secretary of the Treasury jointly to prescribe import regulations.

Act contains in all about thirty-six of such specific authorizations.

There is no express statutory restriction on the exercise of the Administrator's power derived from twenty-four of these specific authorizations. The exercise of his power so derived is subject only to the usual constitutional restrictions. The power to issue, amend, or repeal any regulation contemplated by twelve of those authorizations, all but perhaps two of which contemplate quasi-legislative rule-making, is expressly restricted by statute¹⁵ to the extent that the Administrator may do so only by following the prescribed procedure. This, in general, includes a requirement that he hold a public hearing upon any proposal to issue, amend, or repeal any regulation contemplated by the enumerated sections, and that, after the hearing, he make public his action, or his determination not to take any action on the proposal, by order based only on substantial evidence of record at the hearing and include as part of this order, detailed findings of fact on which the order is based. Regulations so promulgated are subject to judicial review by the Circuit Court of Appeals.

The procedural regulations¹⁶ issued by the Administrator which govern the conduct of the required hearings provide, among other things, that on conclusion of the hearing the presiding officer certify and file his record with the Hearing Clerk. Thereafter the Administrator issues a proposed order and under the regulations, parties of record at the hearings are entitled to file objections to the proposed order accompanied by written argument. After considering these, the Administrator issues his final order.

The procedure for considering and acting on certain

¹⁵ 52 Stat. 1055 (1938), 21 U. S. C. A. § 371; 52 Stat. 927 (1938), 11 U. S. C. A. §§ 906, 907; 21 U. S. C. A. §§ 356(e) and 357(f). (The latter two Sections having been enacted subsequent to, but in part expressly made subject to § 371.)

¹⁶ 21 Code Fed. Reg. § 2.701 *et seq.* (Cum. Supp. 1943).

applications for qualifying new drugs¹⁷ is identical except possibly in some unimportant details, except that in this single instance the Administrator's order is subject to review in the District Court instead of the Circuit Court of Appeals like all the rest.

This striking similarity of the prescribed statutory procedure as implemented by the procedural regulations, to the procedure prescribed in Sections (7) and (8) of S. 7, is not just a coincidence. It rests on a rather significant historical background in the development of administrative law. They had as their common creator the public reaction which developed in the late thirties to agency practices of issuing important substantive regulations of a quasi-legislative character having the force and effect of law, without notice or hearing. Soon after this came the Walter-Logan Bill, later the Attorney General's Committee, and eventually S. 7.

In this connection I think another thing bears mentioning because I think it too may serve as a bit of historical background for certain of the provisions of S. 7. It will be recalled that under the provisions of the rules of practice governing hearings under the Food, Drug, and Cosmetic Act, the presiding officer at the hearing certifies and files his records with the Hearing Clerk. But from there on the Administrator takes over and makes his decision by following virtually the identical procedure as one of the optional procedures authorized in Section 8(a) of S. 7. This was not always so.

I shall now go into a matter of personal experiences as a member of the Administrator's legal staff, and I am sure I am not revealing any confidences by telling about this. Initially the presiding officer who conducted hearings looking to the promulgation of food standards issued proposed findings of fact and proposed orders made by him. These were then published and an opportunity for criticizing

¹⁷ 21 Code Fed. Reg. § 2.110 (Cum. Supp. 1943) as amended by 21 Code Fed. Reg. § 2.110 (Supp. 1944).

them was given to all parties of record. Thereafter, the Administrator would consider the presiding officer's suggested order, together with objections to it, then make his own final decision.

This practice might not create difficulties in quasi-judicial proceedings where the issues are usually simple determinations of fact. However, in the case of quasi-legislative regulations of such importance as the promulgation of food standards¹⁸ which in "the judgment of the Administrator" shall "promote honesty and fair dealing in the interest of consumers," and which shall be "reasonable" from the standpoint of the affected industry, the issues are not so simple. Such regulations have wide ramifications and require more or less intimate and expert knowledge of various and sundry related fields and factors. They are usually of such a character that no one man is qualified to give adequate and proper consideration to them. The Administrator requires the aid of his experts to properly resolve some of the important issues of such records. The evidence upon which these issues are required to be resolved is usually of a highly technical character; frequently involving questions of organic chemistry and other food technology and also economic questions which no one man can settle satisfactorily. It can be seen, therefore, that some rather embarrassing situations could arise if the presiding officer at these hearings were to make the decisions without conferring with anyone. Such embarrassments did arise under the original rules of practice. Some of the presiding officers insisted on secluding themselves and settling these questions all alone which, in several instances, resulted into unscientific and unsound proposed orders which satisfied no one.

These incidents lead to what we then referred to as the "demolition of the ivory tower" by issuing the rules of procedure now in effect.¹⁹ One of the gentlemen who had

¹⁸ 52 Stat. 1046 (1938), 21 U. S. C. A. § 341.

¹⁹ See note 17 *supra*.

much to do with the drafting of S. 7 was the most active participant in the demolition of the ivory tower. I suspect memories of the occasion for changing the rules of procedure to their present form contributed significantly to the inclusion as an option procedure of comparable provisions in Section 8(a) of S. 7.

I shall now consider the procedure followed in the exercise of the administrative functions authorized or required by the act. As stated, in addition to the general grant of authority to the Administrator to promulgate regulations in Section 701(a), the act contains about thirty-six separate and distinct authorizations or requirements for administrative determinations. The time limitation imposed does not permit me to discuss each of these separately, nor do I consider this necessary. I shall, therefore, consider them by classes and shall emphasize such individual sections as I believe warrant discussion.

The administrative determinations authorized or required by the act may be classified, in relation to S. 7, as determinations which are:

1. Neither "rules" nor "orders" as defined in S. 7, wherefore S. 7 has no application;
2. "Rules" within the exemption from the requirements for rule-making contained in Section 4(a) of S. 7;
3. "Rules" of a substantive character for which no agency hearings are required by statute, and which are subject to the procedure for rule-making prescribed in Section 4;
4. "Rules" of a substantive character, required by statute to be promulgated on the record after an opportunity for an agency hearing, hence subject to the procedural requirements of Sections 7, 8 and 11, by reason of Section 4(b); and
5. "Orders," one of three of these being exempt from the procedural requirements for adjudications under Section 5(3).

I will proceed to consider these in that order.

Administrative Determination not subject to S. 7.—This category includes three²⁰ specific authorizations for administrative determinations each of which is of considerable importance to the affected parties.

Section 304(a).—This section provides, among other things, that no libel for condemnation be instituted under the act for any alleged misbranding if there is pending in any court a libel for condemnation based on the same alleged misbranding. Nor shall more than one such proceeding be instituted except when, among others, the Administrator finds, without hearing, that the misbranded article is dangerous to health, or its label is fraudulent or so misleading that it might cause injury or damage to purchasers.

The purpose of this provision is to avoid unnecessary interference with the business of the producers until an issue of alleged misbranding has been determined by the proper tribunal. The 1906 act did not contain a comparable provision. However, in at least one instance²¹ the Court enjoined the institution of more than one seizure because it appeared to the Court that an unlimited number of seizures constituted an unwarranted interference in the light of the relative importance of the issue of misbranding involved. This section is virtually a codification of the principle of that case.

The determinations by the Administrator of the required facts, are extremely important to producers, because as a practical matter, it may well mean temporary or permanent cessation of business. However, this is not a "final" administrative disposition since the court would have to determine ultimately whether the facts warranted multiple seizures, hence it is not an "order" as defined in S. 7.

Section 304(d).—This paragraph includes a provision authorizing the trial court to determine the manner in

²⁰ 52 Stat. 1044, 1045 (1938), 21 U. S. C. A. §§ 334(a) and (d), and 335.

²¹ National Remedies Co. v. Hyde et al; 50 F. (2d) 1066 (C. C. A. D. C. 1931).

which commodities which have been condemned unto the United States may be disposed of. It includes discretionary powers on the part of the court to direct that such article be delivered to the owner thereof

to be destroyed or brought into compliance with the provisions of this act under the supervision of an officer or employee duly designated by the Administrator. . . .

Many of the condemned commodities, particularly those which are misbranded, may readily be "brought into compliance with the act." Others may be salvaged for uses other than human consumption and as such may have a considerable value to the claimant.

The administrative determination as to the manner of disposition of such commodities is, therefore, usually extremely important to the claimant. The administrative determination as to the manner of disposition of condemned commodities is final and, according to recent decisions, does not appear to be subject to any judicial review. Yet this determination is not an "order" since it does not affect any rights. The whole of S. 7 and particularly the provisions of Section 9, dealing with "sanctions and powers," indicate, and I consider it self-evident, that S. 7 concerns itself only with administrative determinations which affect some right of an interest person. The claimant of condemned commodities has lost all rights to them and all proceedings subsequent to condemnation are merely permissive.²² It might be arguable that the court's exercise of its discretion to release the condemned commodities in itself creates the right to be protected against arbitrary determinations, though permissive. In that case such determinations would not be final since the court would still have jurisdiction and could review them. In neither case is the determination an "order."

Section 305.—As stated, all proceedings in the enforcement of the Federal Food, Drug, and Cosmetic Act are in

²² See *United States v. 1322 Cans Black Raspberry Purée*, 68 F. Supp. 881 (N. D. Ohio, 1946); 3 *United States v. 338 Cartons " * " Butter*, (S. D. W. Va., 1946), No. 567, decided Aug. 27, 1946.

the name of the United States, in the Federal District Court, and initiated and prosecuted by the United States attorney. The Administrator has no powers as to these matters. He only has a duty to bring violations of the act to the attention of the United States attorney and to aid in the apprehension and prosecution of the offending person or article. As a practical matter, however, he does enforce the statute since, as far as I know, not a single proceeding has ever been instituted by any United States attorney unless it was recommended by the Administrator. Therefore, the administrative attitude as to an alleged violation becomes extremely important to those charged with the violation of the statute.

This reality of enforcement was recognized by Congress. The statute provides that nothing in the act shall be construed as requiring the Administrator to report for prosecution, or for the institution of a libel or injunction proceedings, minor violation "whenever he believes that the public interest will be adequately served by a suitable written notice or warning." It further provides that before the Administrator reports a violation for criminal prosecution, the person against whom such proceeding is contemplated "shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding." His decision, which should rest at least in part on what was presented at the hearing, is final and not subject to any judicial review. However, on analysis it becomes obvious that the administrative disposition does not affect any rights of such person since neither the act constituting the violation of the law, nor the court's jurisdiction to try the issues, nor the United States attorney's authority to initiate the prosecute such proceedings, are in any way conditioned on the administrative determination made under this section. Although as a practical proposition the administrative determination means prosecution or no prosecution, yet, as a matter of law, it does not mean this

at all since the United States attorney can initiate and prosecute such action independently of any administrative determination or recommendation. The Supreme Court has so held.²³

The administrative determination under this section is, therefore, not an "order" within the meaning of S. 7.

Administrative determinations which are "rules" but are exempt from rule-making under Section 4(a) of S. 7.—This class includes interpretative regulations and statements of policy issued by authority of Section 701(a) of the act. It includes the T. C. letters. "T. C." stands for "Trade Correspondence." It has long been the established practice of the Food and Drug Administration to answer individual communications posing questions which members of the industry desire to have answered by the officials in order to insure compliance with the requirements of the statute. Frequently a question so brought before the Food and Drug Administration is of such a basic nature that the Administration considers it desirable to bring the matter to the attention of the whole industry involved. In such case it makes available for publication relevant portions of that communication which are then published by many publications, including some of the loose-leaf legal services, where they are available for the guidance of those who are interested in the Food and Drug Administration's views as to the meaning of the statute in its application to the specified circumstances. These communications are "rules" within the meaning of S. 7, but are included in the exemptions of Section 4(a). This practice, which is exceedingly valuable, not only to the industry but also to lawyers who have occasion to advise industry, will therefore continue. However, hereafter T. C. letters are required by Sections 3(a)(3) to be currently published in the Federal Register. This will necessarily mean more formal communications but need not necessarily mean

²³ *United States v. Dotterweich*, 64 Sup. Ct. 134, 320 U. S. 277, 88 L. ed. 48 (1943); rehearing denied, 320 U. S. 815, 64 Sup. Ct. 367, 88 L. ed. 492 (1943).

fewer T. C. letters. It is hoped they will not be fewer. Should this requirement become too cumbersome, it might well be disregarded. Failure to publish these letters in the Federal Register would have as its consequence nothing more than that under Section 3(a) of S. 7, no person "shall in any manner be required to resort to organization of procedure not so published." In the case of T. C. letters this means that no person needs to agree with the opinions expressed by the Administrator. But this has been the case in the past hence if the requirement becomes so cumbersome as to substantially restrict issuance of these valuable opinions, the industry may well urge the Administrator to disregard this Congressional mandate. Certainly Congress should have no further interest if the effected industry is served better.

"Rules" of a substantive character for which no agency hearings are required by statute, and which are subject to the procedure for rule-making prescribed in Section 4.—The next group consists principally of substantive regulations of a negative character authorized or required by the Act.²⁴ All but three of these fifteen statutory provisions

²⁴ Sections 403(e)(2), (exemption from declaring weight); 403(i)(2), (exemption that label bear name); 403(k), (exemption from declaring artificial flavoring, coloring or chemical preservative); 405, (exemption from labeling requirement of small, open containers of fresh fruit and foods intended for repackaging, etc.); 502(b)(2), (exemption from declaring weight); 502(e)(2), (exemption from labeling requirement that drug bear common or usual name of each active ingredient and quantity, kind and proportion of each of specified drugs and their derivatives); 502(f)(1), (exemption of drugs from bearing adequate directions); 503(a), (exemption from labeling requirement of drugs intended for reprocessing, etc.); 505(i), (exemption from "new drug" provisions, if for investigational use); 506, (certification of batches of insulin which may include standards of identity, strength, quality and purity and tests and methods of assay, etc., but not regulations prescribing tests or methods of assay differing from those of an official compendium); 507(a), (certification of batches of penicillin which may include standards of identity, strength, quality and purity; tests and methods for assay, exemptions, etc., but not such of these as are promulgated after protest and a request for a hearing. See par. (f).); 602(b)(2), (exemption from weight statement on small packages, cosmetics); 603, (exemption from labeling requirement of cosmetics, intended for repackaging, etc.); 702(b), (establishing exceptions to requirement that Administrator provide a part of official sample to interested persons); 10A, 1906 Act, (regulations relating to sea food inspection).

authorize the issuance of regulations establishing exemptions from specified statutory requirements. The act does not prescribe a procedure for issuing them nor are hearings required. This includes regulations providing for the certification of batches of penicillin, prescribing standards of identity and of strength, quality and purity, prescribing tests and methods of assay, etc., but not when such regulations are issued, repealed or amended on application of an interested person and after protest to the administrative action taken on such application and a request for a hearing. That is, all regulations issued under Section 507 are "rules" subject only to the exception of paragraph (f). So are those issued under Section 506 subject to exception of paragraph (c). This is a departure from the requirements of other sections that similar regulations be promulgated on the record after a hearing. I shall discuss its significance under the next heading.

Since all the regulations contemplated by these provisions are "rules" under S. 7, the Administrator is now required to follow the rule-making procedure prescribed by Section 4 of that law. This requirement, though new, does not constitute an important change since the Administrator, in practice, issued most of these regulations after public notice of informal hearing and an opportunity for submission of argument.

Other new requirements are those of Section 4(d) of S. 7, providing that every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule. However, no specific relief appears to have been provided from arbitrary refusal to grant such a petition. It seems S. 7 does not afford any relief in such a situation unless the circumstance should bring any agency action on such a petition within some of the provisions of Section 10. There are no provisions in S. 7, for example, under which the Administrator could be compelled to issue a "rule" exempting certain packages from the labeling requirements of the Act.

"Rules" of a substantive character, required by statute to be promulgated on the record after an opportunity for an agency hearing, hence subject to the procedural requirements of Sections 7, 8 and 11, by reason of Section 4(b).— This group includes all of the substantive regulations of an affirmative character,²⁵ except those issued under Sections 506 and 507 for which no hearing is required. By this I mean that compliance with these regulations requires some affirmative act. All but the exceptions mentioned are required by statute to be promulgated on the record after an opportunity for an agency hearing. Therefore, the agency process in issuing them is subject to the requirement of Sections 7, 8, and 11 of S. 7, except in so far as the previously discussed procedures prescribed by statute may include additional requirements. In that case such additional requirements must be met. (Section 12 of S. 7.)

The act contains thirteen statutory authorizations for promulgation of this kind of regulation. Time limitation does not permit, nor do I think our subject warrants, discussing each of these in detail. I shall discuss only the two more important and unusual ones, and particularly one of the exceptions to the hearing requirement which, in my opinion, constitutes an important development in administrative legislation.

This exception is found in Section 507 of the act which prescribes the procedure for issuing penicillin regulations.

²⁵ Sections 401, (establishing food standards); 403(j), (prescribing labeling requirements for foods sold for special dietary uses); 404(a) (prescribing conditions in emergencies for issuing permits to produce foods); 406(a), (prescribing tolerances for required poisons in foods); 406(b), 504 and 604, (providing for certification of coal-tar colors for use in foods, drugs and cosmetics, respectively); 501(b), (prescribing tests for methods of assay for drugs different from tests of official compendium); 502(d), (designating derivatives of certain specified drugs as habit-forming); 502(h), (prescribing manner of packaging of drugs which are subject to deterioration); 506(e), (prescribing tests or methods of assay for determining strength, etc., of insulin, which differ from those of official compendium); 507(f), (agency action after protest and request for hearing, to action on proposal to issue, amend or repeal any regulation under 507—see par. (f)). In process of preparation, legislation providing for certification of batches of streptomycin similar to penicillin requirements will probably be included as part of § 507.

A batch of such a drug is eligible for certification if it has such "characteristics of identity" and such "characteristics of strength, quality and purity," as the Administrator prescribes in such regulations. Such regulations may include provisions prescribing standards of identity and of strength, quality and purity and tests or methods of assay to determine compliance with such standards. It should be noted, therefore, that the regulations authorized by this section are of the same character as those contemplated by the sections listed in Section 701(e) of the act. Section 507 became law subsequent to the passing of the act, wherefore it is not listed in Section 701(e). Had it been proposed as part of the original act, it surely would have been so included in its entirety and for the same reasons as were those so listed. However, at a later date none of the regulations contemplated by this section were made subject to Section 701(e) except under certain prescribed circumstances. Therefore, the regulations issued under this section are "rules" not subject to any procedural requirements other than those of Section 4 of S. 7, unless they come within the exception, and in that case the procedure of Section 701(e) is required to be followed in issuing them.

The exception noted arises under paragraph (f) of Section 507. This paragraph provides in substance that any interested person may file a petition proposing the issuance, amendment, or repeal of any regulation contemplated by Section 507. This includes regulations fixing standards for penicillin and prescribing tests or methods of assay. The Administrator, upon receipt of such petition, is required to give public notice of the proposal and an opportunity for interested persons to present their views orally or in writing and thereafter make public his action. This action is still a "rule" subject to the provisions of Section 4 of S. 7. It should be noted that the statutory requirements of Section 507 are identical with the comparable requirements in Section 4 of S. 7.

The provisions of this paragraph then continue by pro-

viding that at any time prior to the thirtieth day after the Administrator has made his action on such petition public, any interested person may file objections to such action specifying with particularity the changes desired, stating reasonable grounds therefor and requesting a public hearing upon such objections. The Administrator is then required to hold a public hearing on the issues raised by those objections and his determinations on the objections are required to be based only on substantial evidence of record at that hearing and are expressly made subject to the judicial review provisions of the act. Therefore, this administrative action is a "rule" required to be promulgated on record after an opportunity for an agency hearing, hence is subject to the requirements of Sections 7, 8 and 11, by reason of Section 4(b) of S. 7.

The distinction between this procedure and the procedures prescribed for all but one of the other substantive regulations of a positive character is highly significant and bears emphasizing. It will be noted that by this procedure regulations may be issued by the Administrator on his own initiative or on application of the industry, in a relatively informal manner. He need only give notice and afford interested persons an opportunity to criticize the proposal. The more formal procedure is restricted to such questions as remain controversial after a regulation has been issued.

This procedure, in my opinion, marks a significant forward step in the development of administrative law for the promulgation of quasi-legislative regulations. It affords the protection against arbitrary administrative action where such protection is needed, yet does not unnecessarily encumber and impede administrative actions as to matters concerning which no controversy exists. It narrows the issues to the controversial questions raised by the agency action.

These provisions are all the more significant because they were proposed by the representatives of the leading

members of the affected industry. Even more significant is the fact that this section has been in operation for about one and one-half years during which time scores of regulations have been issued for more than a dozen kinds of penicillin preparations, yet to date there has not been a single request for a hearing. To my mind this type of proceeding for quasi-legislative regulations represents a happy compromise between unrestrained administrative action on the one hand and the procedural restraints included in this act which have proven highly cumbersome, particularly in the food standards proceedings.

It may be argued, and this is the fact, that this less formal procedure was made necessary by reason of the peculiar circumstances which presented themselves in a new and rapidly expanding industry. In that case it only serves as another example that necessity is the mother of invention. Since adequate protection is afforded against arbitrary administrative action, what difference does the subject matter of such legislation make? For example, there is no reason why a qualified witness should be brought to Washington to testify in a food standard hearing, or an insulin proceeding, or any of the other drug proceedings referred to, as to matters which he has published and which everybody accepts as scientifically sound. There is time enough to bring him when either side has, in the form of objections, challenged the accuracy of his reported scientific data on which a controversial conclusion is based.

In my humble opinion, students of administrative law who will scrutinize and ponder the procedure prescribed in this section for the promulgation of quasi-legislative regulations, will do so profitably.

The other section which warrants discussion is Section 404. No occasion has yet arisen requiring the exercise of the authority here granted, but the section is important for our purposes because it is somewhat unusual.

This section authorizes the Administrator to "promul-

gate regulations providing for the issuance" of permits to manufacturers of a specified class of food in a specified locality, whenever he finds, after investigation, that such foods have become contaminated with micro-organisms during their production so as to render them injurious to health and that such injurious nature cannot be adequately determined after such a food has entered interstate commerce.

The word "permit" in this section immediately suggests a license as defined in S. 7. It will be noted, however, that the regulations authorized by this section do not constitute the permit. They merely prescribe the basis for issuing a future permit to a specified class in the specified locality. They merely serve to supplement those provisions of the statute which declare that no adulterated foods may be shipped in interstate commerce and that foods manufactured, processed or packed under unsanitary conditions whereby they *may* have become dangerous to health, are adulterated. The regulations contemplated by paragraph (a) of this section are, therefore, a "rule" and since a hearing is required for their promulgation, they are subject to the provisions of Sections 7, 8 and 11 of S. 7.

The issuance of the "permit" by the Administrator, after the promulgation of these regulations seems to be "licensing" as defined in Section 2(e) of S. 7.

Paragraph (b) of this section further provides for suspension of permits when their terms have been violated and for reinstatement thereof, upon a showing of compliance with the conditions imposed. No hearing is prerequisite to suspending such a permit and, since the suspension is for the protection of public health, this may also be done summarily under the exception in Section 9(b) of S. 7, dealing with suspension of licenses.

A hearing is required on an application for the reinstatement of such a permit. The agency action on an application for such reinstatement is an adjudication, hence sub-

ject to the procedure prescribed by Sections 7, 8 and 11, of S. 7.

"Orders" as defined in S. 7.—This class includes three kinds of agency determinations, (1) action on an application for reinstatement of a permit,²⁶ (2) action on new drug applications,²⁷ and (3) actions denying entry into the United States of commodities subject to the Act which fail to conform to the requirement of the act.²⁸

The first of these we have discussed in our consideration of Section 404.

The agency action with respect to applications for qualifying new drugs for shipment in interstate commerce is required to be taken by following the procedure prescribed in Section 505 of the act.

No action need be taken on the application. In that case such application becomes effective within the specified time without further proceedings. But when the Administrator is not able to determine the safety of the new drug from such application, he may not reject it except by order based on the record at a hearing. The procedural requirements prescribed for the conduct of this hearing are substantially the same as those prescribed for the issuance of the quasi-legislative regulations.

The Administrator's action refusing a new drug application to become effective comes within the definition of "licensing" in S. 7, hence is subject to the adjudicatory procedure prescribed for licensing. It should be noted that the restrictions of trial examiners imposed by Section 5(c) of S. 7, is not applicable here by reason of the exception therein contained.

The Administrator is further authorized to suspend applications which have become effective. This may be done only after due notice and an opportunity for a hearing and by an order based on the record of such a

²⁶ Section 404(b).

²⁷ Section 505.

²⁸ Section 801.

hearing. This agency action is also adjudicatory, hence subject to the procedure prescribed in Sections 7, 8 and 11, of S. 7.

The statute expressly provides that orders issued refusing an application to become effective or suspending an effective application, may be reviewed by the District Court on appeal by the applicant. The review provisions follow the usual pattern and are virtually the same as those prescribed in Section 701. This is the only instance where this law provides for a review in the District Court. The appeal from all other reviewable orders is to the Circuit Court of Appeals. No particular significance attaches to this. The only explanation for it, as far as I know, is the fact that originally it was proposed that all reviewable orders be reviewed in the District Courts. This point was one of several having to do with the proposed procedure for issuing quasi-legislative regulations, which had been somewhat controversial. This particular issue was compromised by providing for a direct appeal to the Circuit Court of Appeals. However, the procedure for the handling of new drug applications was never controversial. It is reasonable to suppose, therefore, that it was either overlooked when the review provisions were revised, since that revision concerned itself with quasi-legislative regulations, or that it was considered inadvisable to agitate the matter further since no one objected to a review of these adjudicatory orders in the District Court. Furthermore, there is more reason for prompt dispositions of the former orders than of the latter.

The remaining provisions authorizing and directing promulgation of orders concern themselves with imports.²⁹

Upon the Administrator's request, the Secretary of the Treasury is required to deliver samples of commodities offered for import which are subject to the Act. He shall refuse entry to the United States of such commodities which are reported to him by the Administrator as failing

²⁹ Section 801.

to conform to the requirements of that act. The Administrator is required to make his determination as to the fitness of any commodity on "examinations of such samples or otherwise." The act provides for notice and a hearing with a right to introduce testimony relevant to the issue of fitness.

The refusal of entry of such commodities upon such report is an "order" as defined in S. 7. However, since it is based on the Administrator's report of determination as to facts made "from the examination of such samples or otherwise," it is exempt from the adjudicatory procedure of S. 7, under Section 5(e). The administrative determinations made under this section appear reviewable in the District Court in an action to set aside the order refusing entry of commodities,³⁰ and Section 10 of S. 7, provides for review of this type of administrative order.

I notice from the announcement that I am expected to discuss the judicial review of the regulatory functions of this agency. I think I have covered this point in each instance as I have gone along.

The remaining point suggested for consideration is the effect of Section 3 of S. 7 on the Act and the steps taken by the agency to comply therewith. Under this section the Administrator is required to publish in the Federal Register, among other material, rules not heretofore required to be published. However, as a matter of practice all of such rules, except T. C. letters, have been published in the Federal Register, therefore this requirement does not affect any changes in the existing procedure save for the requirement that T. C. letters be published.

The Federal Security Administrator has complied with requirements of Sections 3(a)(1) and (2) of the Procedure Act and by publishing in the Federal Register for September 11, 1946 his organizational and procedural material. A statement of general policy as required by Section 3(a)(3) appears to be included in the published material.

³⁰ The James J. Hill, 65 F. Supp. 265, (D. C. D. Md., 1946).

However, no substantive rules heretofore adopted are so included. Presumably the reason for this is the fact that the Administrator has heretofore, as a matter of practice, published such rules in the Federal Register where they may be found now. Such publication would seem to constitute a compliance with the provisions of Section 3(a) (3).

CONCLUSIONS

The extent of the impact of S. 7 on the Federal Food, Drug, and Cosmetic Act may then be summarized as follows:

1. Our first group, as we have seen, included administrative determinations which are not within the contemplation of S. 7, therefore these are not affected.

2. Our second group includes interpretative regulations and T. C. letters which are "rules" required to be published in the Federal Register, formerly not required to be so published. However, interpretative regulations have been published as a matter of practice in the past, therefore, no change in existing procedure is required with respect to these. T. C. letters were not so published, formerly. This new requirement will undoubtedly mean more formal, and as a consequence possibly fewer, T. C. letters. However, it is hoped they will not be fewer.

3. Our third group includes substantive regulations of a negative character which are "rules" subject to the procedural requirements of Section 4 of S. 7. However, since the Administrator, in practice, has always promulgated these regulations on notice and an opportunity for submission of argument, these new provisions will not require any change in the existing procedure.

4. Our fourth group includes substantive regulations of a positive character which are "rules" required by statute to be made on the record after an opportunity for an agency hearing, wherefore, the requirements of Sections 7 and 8 of S. 7 apply. Whether significant changes are required in the existing procedure in promulgating the

regulations of this group, will depend on which of the three procedures for making decisions prescribed in Section 8 of S. 7, the Administrator elects to follow.

It will be recalled under that section the initial decision may be made by the officer presiding at the hearing, in which case it shall be final subject to the review prescribed in that section. Or, the initial decision may be made by the Administrator provided he has "in specific cases or by general rule," required the record to be certified to him for initial decision, in which event the officer presiding at the hearing shall make the recommended decision, except that in rule-making or determining applications for initial license the agency may, in lieu thereof, issue a recommended decision. It will also be recalled that the existing procedure for promulgating regulations which fall in our fourth category, conforms to this alternative procedure of Section 8, whereunder the Administrator, by requiring the record to be certified to him, may make the initial decision after issuing his own tentative decision. I understand the Administrator expects to follow this course so that the existing procedure will remain substantially unchanged. To do this he will either have to issue a general regulation requiring certification to him of all records made at hearings held under the specified sections or else he will have to issue such an order to presiding officers in specific hearings. No general regulation has been published and I understand none is being contemplated at the present, but that the Administrator intends to follow the practice of requiring certification of the re-records in specific cases as they arise. Should the latter procedure be finally decided upon, it seems to me the requirement for the certification of the record should be contained in the notice of hearing because, in my opinion, the spirit, if not the letter of the law, contemplates that interested persons know who is to render the decision, before the hearing begins.

Whenever the Administrator fails to require the certification of the record to him for initial decision or elects

not to issue a proposed decision, then it will be necessary to depart from the existing procedure, of course, to the extent that either the presiding officer will make the final decision subject to the prescribed review or he will make a recommended decision, as the case may be.

5. Our fifth and last group, as will be recalled, includes two requirements for administrative actions which are "orders," namely (1) an order refusing to allow a new drug application to become effective or revoking one which has become effective, and (2) an order reinstating a suspended emergency permit issued under Section 404.

The requirements of S. 7 do not necessitate a change in the existing procedure for the simple reason that it has not heretofore become necessary to establish a formal procedure under either of these statutory requirements for hearings. There has been only one proceeding on new drug applications which has gone to final order. In that case the presiding officer issued and served on the respondent the proposed order, whereafter the Administrator issued the final order. No proceedings reinstating a permit have ever been had since the provisions of Section 404 have never been invoked since that section has become law. Hereafter the adjudicatory procedure prescribed in S. 7 will be required to be followed in promulgating these orders.

AN ANALYSIS OF FEDERAL TRADE COMMISSION PROCEDURES AS THEY RELATE TO THE ADMINISTRATIVE PROCEDURE ACT.

ROBERT E. FREER

It is indeed a challenging task to undertake to deal extensively with the impact of the Administrative Procedure Act upon the Federal Trade Commission so shortly after enactment of that Act. In the interest of orderly and intelligible presentation I first will sketch briefly the Commission's background and the job for which it was created.

The Federal Trade Commission Act (38 Stat. 717 (1914), 15 U. S. C. A. §§ 41-51; 48 Stat. 31 (1933), 7 U. S. C. A. § 610; 52 Stat. 111 (1938), 15 U. S. C. A. §§ 41 *et seq.*) was the product of many years' discussion in the Congress regarding effective means of controlling monopolies and preserving our traditional free enterprise system of trade and commerce. It represented many compromises between conflicting points of view and it is understandable that not many of its sponsors wished to predict with precision the Commission's problems of the 1940's when the Commission was created in 1914 with a mandate to "prevent persons, partnerships or corporations . . . from using unfair methods of competition in commerce."¹ It is clear that the Commission's primary duties were to be prophylactic in nature and that it was to be more than a quasi-court of industrial relations settling such disputes as might be brought to it by litigants.

As the U. S. Circuit Court of Appeals said in *Pep Boys—Manny, Moe and Jack, Inc. v. Federal Trade Commission*,²

The procedure in the Federal Trade Commission Act is prescribed in the public interest as distinguished from provisions intended to afford remedies to private persons.

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¹ 52 Stat. 111 (1938), 15 U. S. C. A. § 45.

² 122 Fed. (2d) 158 (C. C. A. 3d, 1941).

Congress made no further attempt in the Federal Trade Commission Act to prepare an *index expurgatorius* of practices over which the Commission was to have jurisdiction, and, as was stated by Mr. Justice Brandeis in his famous dissenting opinion in *Federal Trade Commission v. Gratz*,³

Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed.

When the Commission has reason to believe that any person, partnership, or corporation has engaged in unfair acts, practices or methods of competition in commerce, it is empowered and, moreover, directed to issue and serve a formal complaint setting out wherein it believes the law to have been violated if a proceeding in respect thereto appears to the Commission to be in the interest of the public.⁴ The Federal Trade Commission, exercising the broad jurisdiction granted by this enactment, has held numerous practices and methods to be unlawful, and the overwhelming majority of such of its orders as were appealed have been sustained by the courts.⁵ Practices and methods, to name a few, which are now generally regarded to be within the prohibitions of Section 5, are combination or conspiracy to fix or control prices or to hamper, boycott or obstruct business rivals; misrepresentation as to com-

³ 253 U. S. 421-436, 40 Sup. Ct. 572, 64 L. ed. 993 (1920).

⁴ Section 5(b).

⁵ See Annual Report, 1946, pp. 37-43 for statistics.

position, origin, quality or source of commodity; false and misleading advertising; sale of products by means of lottery or chance devices: commercial bribery; and disparagement or misrepresentation concerning a competitor.

Section 11 of the Clayton Act (38 Stat. 730 (1914), 15 U. S. C. A. §§ 12-27, 44, 18 U. S. C. A. § 412, 28 U. S. C. A. §§ 381-383, 386-390, 29 U. S. C. A. § 52) vests authority in the Commission to enforce compliance with the proscriptive provisions of Sections 2, 3, 7 and 8 of this legislation.⁶ In language not dissimilar to that of Section 5 of the Federal Trade Commission Act, the Commission is directed to issue and serve a complaint stating its charges whenever it shall have reason to believe that any person is violating or has violated such sections of the act. Section 2 in substance makes it unlawful to discriminate in price in the course of interstate commerce when the effect is to suppress competition, create a monopoly or injure, prevent or destroy competition; to pay or receive anything of value as brokerage or in lieu of brokerage when the recipient is acting in behalf of, or under the control of, anyone other than the person by whom the brokerage or allowance is granted; to pay customers for services or facilities furnished by the customer unless such payments are available to all competing customers on proportionally equal terms, to furnish services or facilities to a purchaser which are not accorded to all other purchasers on proportionally equal terms; or knowingly to induce or receive a discrimination in price prohibited by the Section.

Section 3 of the Clayton Act refers to so-called "full line forcing" and "exclusive dealing" contracts, and makes it unlawful for a seller or a lessor to require that a purchaser or lessee shall not use or deal in the goods of a competitor of such seller or lessor where the effect of the arrangement may be substantially to lessen competition or tend to create a monopoly.

Section 7 deals with the acquisition of stock of one

⁶ 38 Stat. 734 (1914), 15 U. S. C. A. § 21.

corporation engaged in interstate commerce, or of stock of two or more such corporations, by another so engaged, and makes such acquisition unlawful where its effect may be substantially to lessen competition between the acquiring and the acquired corporations, or between the two or more acquired corporations, or to restrain commerce in any section or community, or tend to create a monopoly in any line of commerce.

Under Section 8 of the Clayton Act it is unlawful for a person at the same time to be a director in two or more corporations where either has capital, surplus and undivided profits aggregating more than \$1,000,000 and is engaged in commerce, if such corporations are or shall have been theretofore competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws.

Under the Wheeler-Lea Act of 1938 (52 Stat. 111, 15 U. S. C. A. §§ 52 *et seq.*) the Federal Trade Commission Act was amended to empower the Commission, among other things, to expand its jurisdiction over unfair and deceptive practices in the advertising of food, drugs, devices and cosmetics. These provisions empower the Commission to require positive disclosure of certain facts in advertising where their omission would be misleading, and permit the seeking of temporary injunctions and restraining orders in the District Courts of the United States pending proceedings under Section 5.⁷

Under the Wool Products Labeling Act of 1939 (54 Stat. 1128, 15 U. S. C. A. § 68) the introduction, or manufacture for introduction into commerce, or the sale, transportation or distribution in commerce of any wool product which is misbranded is declared to be unlawful, and an unfair method of competition and an unfair and deceptive act or practice.⁸ Any person who shall manufacture, or deliver for shipment, or ship or sell or offer for sale in commerce any misbranded wool product is declared to be guilty of

⁷ 52 Stat. 115 (1938), 15 U. S. C. A. §§ 52, 53.

⁸ 54 Stat. 1129 (1940), 15 U. S. C. A. § 68(a).

an unfair method of competition and an unfair and deceptive act or practice under the Federal Trade Commission Act. Misbranding is specifically defined therein and the Commission is authorized to cause tests, inspections, analyses and examinations to be made of any wood product subject to the Act. The Commission also is given the power to make rules and regulations and prescribe procedure thereunder, to which provision I shall refer later.

Most of you are familiar in a general way with the manner in which the Commission proceeds against a specific individual charged with a violation of the laws which it administers. The Administrative Procedure Act does not alter the Commission's procedures in this aspect of its work in any material respect, since the Commission had long prior to that enactment accomplished an administrative divorce of its investigative and prosecutive functions from those in which it acted as a tryer of facts. Orders of the Commission in these proceedings are reviewable directly in the U. S. Circuit Courts of Appeals, and the procedures adopted by the Commission have been subject constantly to judicial review over a period of more than thirty years with gratifying results attesting the Commission's fairness to respondents.

I would like to reiterate the thought that the Commission is not a body determining disputes between litigants but that its primary duty is to act affirmatively and effectively to prevent destruction of the free competitive system by predatory practices. Ancillary to this duty the Commission has certain other functions and powers which are difficult to classify within the usual categories of administrative law. For instance, under Section 6 subsections (a)-(h), it has power to gather and compile information concerning the practices of any corporation engaged in commerce, except banks and common carriers; to require such corporations to file annual or special reports relating to their practices; to investigate, upon its own initiative, the manner in which a final decree in any suit brought by the United States

under the anti-trust acts has been or is being carried out; to make investigations, upon the direction of the President or of Congress, into alleged violations of the anti-trust acts; upon application of the Attorney General, to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust laws; to investigate trade conditions in and with foreign countries and to report to Congress with its recommendations regarding associations, combinations, or practices as they affect the foreign trade of the United States; and under Section 7 to act as a Master in Chancery in any suit in equity brought by the Attorney General under the anti-trust acts. Under Section 2 of the Clayton Act, the Commission may, after investigation and hearing, fix and establish the limits of quantity discounts for the sale of goods in commerce where it is found that available purchasers in greater quantities are so few as to render quantity differentials unjustly discriminatory or promotive of monopoly in any line of commerce. It must make investigations of export trade associations and may make recommendations to such associations for readjustments in organization and management to conform with the provisions of the Webb-Pomerene Export Trade Act.⁹

So much for the statutes administered by the Commission. I now turn to the Administrative Procedure Act itself.

PUBLIC INFORMATION, SECTION 3

The Commission has directed its efforts through the years toward the development of a procedure within the framework of the laws it administers which will guarantee to all parties full opportunity to be heard. While it has been criticized because of delays resulting therefrom, it has not deviated from its insistence upon a full and impartial hearing. Its General Policy and Rules of Practice have been developed in an effort to insure the fair and

⁹ 40 Stat. 517 (1913), 15 U. S. C. A. § 65.

even administration of its laws. As a result of this policy the passing of the Administrative Procedure Act brought about no revolutionary change in the operation of the Federal Trade Commission. Such revisions as were necessary were made as rapidly as possible—some prior to the effective date of the Act and others as soon as legal authority was conferred under the Act. These changes provide in some instances for additional steps in the Commission's procedure, and insofar as they do, it must be recognized that there is inherent in them the possibility of further delays.

Amended Rules of Practice were adopted last June and published by the Commission on July 1, 1946.¹⁰ Effort was made to give effect therein to both the letter and spirit of the Administrative Procedure Act. Changes made consisted in large part of putting into writing practices and procedures which were in common use but which had not been actually committed to writing prior thereto. An example of this type of change appears in the rule governing hearings on formal proceedings. The following is quoted from that rule as published on July 1, 1946:¹¹

Every party respondent shall have the right of due notice, cross-examination, presentation of evidence, objection, exception, motion, argument, appeal and all other fundamental rights.

This section did not appear in the previously published rule governing hearings on complaints. Some of the rights outlined therein were provided for elsewhere in rules,¹² but those rights, whether or not previously set forth in any written rule, had been preserved to the respondents by the Commission in the course of its regular procedure. A similar situation will be found in comparing the rule on evidence published July 1, 1946, with that previously in effect.¹³

¹⁰ Rules, Policy and Acts July 1, 1946.

¹¹ Rule XV(a).

¹² Rules X, XII, XIV, XXI and XXIV July 1, 1945.

¹³ Cf. Rules, Policy and Acts Rule XVII July 1, 1945, with Rule XVIII July 1, 1946.

In general it may be stated that insofar as the Federal Trade Commission is concerned, the effect of Section 3 of the Administrative Procedure Act was to cause it to analyze more carefully its practice and procedure and to express more definitely and in greater detail the rules and policy governing its action. These, together with a description of its organization, the manner in which the public may make submittals or requests, its procedure and the channeling of its functions have all been fully set forth in the Federal Register.¹⁴

Paragraphs (b) and (c) of Section 3 have not had any appreciable effect upon Commission procedure. Final opinions or orders in the adjudication of cases have been published and been made available to public inspection. As a matter of fact, the Commission took the initiative in this matter when provision was first made for the publication of the Federal Register and has succeeded in having its orders published therein since 1938. These, of course, are served upon the parties involved, but the Commission felt the general publication would serve to put others on notice as to practices that were prohibited and would thereby accomplish results much broader than those flowing directly from specific Commission action.

The exceptions in paragraph (b), which provide for confidential treatment, have no application to the Commission's work since all of its orders are published and all formal documents including the complaint and findings of fact are available for public inspection.¹⁵

All matters of official record of the nature described in paragraph (c) of Section 3 are and always have been available to persons properly and directly concerned so that this section has no effect upon the Commission's practice.

RULE-MAKING, SECTION 4

Functions of the Commission which might be considered

¹⁴ 11 Fed. Reg. 177A-571 to 574 (Sept. 11, 1946); 11 Fed. Reg. 14233-14240 (Dec. 11, 1946).

¹⁵ Rule XXIX(e) (g) (i).

in any discussion of rule-making are (1) the publication of Rules of Practice governing procedure in Commission proceedings, (2) the promulgation of trade practice conference rules, and (3) publication of any amendments to rules and regulations previously issued under the Wool Products Labeling Act of 1939.

Rules of Practice.—In carrying out its statutory functions the Commission publishes from time to time Rules of Practice setting forth the procedure to be followed in formal and informal Commission proceedings. Such Rules of Practice and any amendments thereto are published in the Federal Register and are made available to interested parties in pamphlet form.¹⁶ Section 4(a) of the Administrative Procedure Act specifically excepts this type of rule from the requirements of such Section, and Sections 7, 8 and 11 of the act are likewise inapplicable.

Trade Practice Conference Rules.—Under the Commission's trade practice conference procedure the Commission, acting in the public interest, invites all members of an industry to attend an industry conference to consider practices in that industry and to adopt rules covering unfair practices therein. After further hearing of interested parties, rules are promulgated for the industry and the members afforded opportunity to indicate their willingness to observe such rules in the conduct of their business.¹⁷ By agreeing to abide by the rules for their industry they, in effect, agree to abandon or refrain from using the stated unfair practices.

Trade practice rules, as promulgated by the Commission, are divided into Group I and Group II rule. Group II rules have no status other than as expressions of what is considered desirable in the interest of promoting fair competitive conditions. Group I rules define industry practices which are deemed to be unfair methods of competition, unfair or deceptive acts or practices, or other illegal prac-

¹⁶ Rules, Policies & Acts, Dec. 11, 1946.

¹⁷ Rule XXVIII, Dec. 11, 1946.

tices, under laws administered by the Commission, as construed by the Commission and the courts. They do not purport to make unlawful any practice which is not illegal under existing statutes. They merely catalogue such illegal practices for the information and guidance of industry members. As interpretations of existing decision law as applied to practices in particular industry, such trade practice rules are considered to come within the specific exceptions set forth in Section 4(a) of the Administrative Procedure Act.

The public procedures followed in trade practice conference proceedings respecting publication of notice and opportunity afforded interested parties for participation, although not considered to be subject to the requirements of Section 4, are such as to comply fully with its provisions. In fact, in providing for oral hearing, the trade practice conference procedure goes beyond the requirements of such Section. Since there is no statutory requirement of hearing in such proceedings, this procedure is not considered subject to the requirements of Section 7, 8 and 11 of the Act.

Rules and Regulations Under the Wool Products Labeling Act—Sections 6(a) of the Wool Products Labeling Act of 1939 authorizes and directs the Commission to make rules and regulations for the manner and form of disclosing certain required information and for segregation of such information for different portions of a wool product as may be necessary to avoid deception and confusion, and to make such further rules and regulations under and in pursuance of the terms of such Act as may be necessary and proper for administration and enforcement.¹⁸ Pursuant to such authority, the Commission promulgated rules and regulations effective July 15, 1941, after hearing held pursuant to notice published in the Federal Register and full opportunity for participation by interested parties.¹⁹

Amendments to the rules and regulations issued under

¹⁸ Section 6(a).

¹⁹ 16 Code of Fed. Reg. 800.1 et seq.

the Wool Products Labeling Act are not included in the specifically excepted categories set forth in Section 4(a). Since the Wool Act does not require that any amendments to such rules and regulations to be made on the record after opportunity for hearing, the requirements of Sections 7, 8 and 11 of the Administrative Procedure Act are not considered applicable.

ADJUDICATION, SECTION 5

The Federal Trade Commission is concerned with the exceptions contained in the first paragraph of Section 5 only insofar as they may relate to cases in which it is acting as an agent for the court. This will include matters referred to it as a master by the court as has been done, for example, in cases where the Commission sought enforcement of orders issued under the Clayton Act.²⁰ It may also be appointed a master under Section 7 of the Federal Trade Commission Act to ascertain and report an appropriate form of decree in any equity suit brought by the Attorney General as provided in the Anti-Trust Acts. Even this exception is not considered important since the requirements of Section 5 of the Administrative Procedure Act are no more stringent than those the Commission has imposed upon its agents, employees and itself in carrying out the direction of the court when it has been appointed as a master.

With regard to all cases of adjudication required by statute to be determined upon the record, the provisions concerning notice and procedure are being and have been followed. Rules of practice in effect prior to the adoption of the Administrative Procedure Act did not contain specific provision for the submission of offers of settlement or adjustment, but the parties were always at liberty to submit these for consideration, and, and in a substantial number of cases, availed themselves of this procedure, as is evidenced by numerous matters wherein stipulations as to the facts

²⁰ D. 1574, D. 4240 and D. 4247.

have been received by the Commission and have formed the basis for the findings and orders subsequently issued.²¹ In order that there may be no question as to the availability of this method of settlement, the Commission has added the following paragraph to its Rule of Practice governing complaints:²²

Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of facts, arguments, offers of settlement or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and due consideration shall be given to same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

The adjudication functions of the Commission are those exercised in carrying out statutory requirements with regard to complaints, findings of fact and orders. These functions are subject to Sections 5, 7 and 8 of the Administrative Procedure Act insofar as those sections are applicable to our work, and it is believed that quotations from some of our amended Rules of Practice will show both the manner in which those sections have affected the Commission's procedure as well as the action taken to insure conformity with the statute. The following excerpts from Rules 14 and 22²³ were adopted to secure compliance with subsection (c) of Section 5:

Except where he shall have become unavailable to the Commission, the said recommended decision shall be made by the trial examiner who presided at the hearing.

Trial examiners shall perform no duties inconsistent with their duties and responsibilities as such. Save to the extent required for the disposition of *ex parte* matters as authorized by law, no trial examiner shall consult any person or party as to any fact in issue unless upon notice and opportunity for all parties to participate.

²¹ D. 4563, D. 5013 and D. 4865.

²² Rule V, Dec. 11, 1946.

²³ Rules, Policies & Acts, Dec. 11, 1946.

Trial examiners shall not be responsible to, or subject to the supervision or direction of, any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission.

No officer, employee or agent, engaged in the performance of investigative or prosecuting functions for the Commission in any case shall, in that or a factually related case, participate or advise in the recommended decision of the trial examiner, except as a witness or as counsel in public proceedings.

The Federal Trade Commission has not availed itself of the authorization in Section 5(d) to issue declaratory orders, to terminate controversies or to remove uncertainties.

HEARINGS, SECTION 7

The provision with regard to presiding officers contained in Section 7(a) has caused no material change in procedure of the Commission. Subsection (b), however, has conferred additional powers and duties upon hearing officers, and appropriate changes have been made in the Rules of Practice to provide therefor. The principal changes in this regard relate to the issuing of subpoenas, taking of depositions and submission of recommended decisions.

Prior to the passage of the Administrative Procedure Act, subpoenas *ad testificandum* were issued by a Commissioner and application therefor could be made to the Secretary or to the presiding trial examiner. Applications for subpoenas *duces tecum* were submitted to the Commission and passed upon by it.²⁴ The Commission also determined when evidence might be taken by deposition.²⁵ These functions are now exercised by the officer presiding at the hearing, and provision is made in the Rules of Practice for appeal to the Commission from the presiding trial examiner's denial of a motion to quash or refusal to issue a subpoena for the production of documentary evidence.²⁶

²⁴ Rule XV July 1, 1945.

²⁵ Rule XVIII July 1, 1945.

²⁶ Rule XVI(g) Dec. 11, 1946.

The presiding trial officer also has the duty of filing with the Commission a recommended decision.²⁷

Rule XX of the Commission's Rules of Practice calls for the filing of motions before the trial examiner at the termination of the reception of evidence and for appeal to the Commission from any adverse rulings thereon. The purpose of this rule was to clear up the record before the trial examiner's recommended decision was prepared so as to insure that it be based upon the record in its final form and that the identical record would be before both the trial examiner and the Commission when decision is made. There is no provision in the Administrative Procedure Act requiring such a rule, but the Commission is of the opinion that it definitely furthered the intent and purposes of the Act.

Subsections (c) and (d) of Section 7, relating to evidence and to the record, required no change in the Commission's procedure. The trial examiners had passed upon the admissibility of the evidence admitting that which was relevant, material and competent and excluding the irrelevant, immaterial and unduly repetitious. All findings, conclusions and recommendations of the trial examiner are based upon the greater weight of the evidence, as are the decisions of the Commission. This is true under the present procedure. It was true prior to the passage of the Act. The record for decision consists of the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding.

DECISIONS, SECTION 8

Section 8 of the act has effected a substantial change in the Commission's procedure. Under subsection (a) of this section, the Commission has reserved to itself (as heretofore) the function of making the initial decision.²⁸ This places upon the trial examiner the duty of presenting a recommended decision.²⁹ The exceptions as to rule-making

²⁷ Rule XXII Dec. 11, 1946.

²⁸ Rule XXV Dec. 11, 1946.

²⁹ Rule XXII Dec. 11, 1946.

and initial licenses do not apply to the work of the Federal Trade Commission.

Under Subsection (b) of Section 8, it is provided that prior to each recommended or initial decision the parties shall be afforded reasonable opportunity to submit for the consideration of those participating in the decision proposed findings and conclusions or exceptions to the decisions, or recommended decisions and reasons in support thereof. The statute makes the submission of this material a matter of right. Prior to its enactment, it was optional with the presiding trial examiner as to whether or not he would avail himself of the provisions of the Rule of Practice relative to receiving statements from attorneys for the Commission or for the respondent setting forth their contentions as to the facts proved in the proceeding.³⁰ It was also optional with the trial examiner as to whether or not he should receive material submitted in addition to that which he may have requested, but I know of no instance where a trial examiner or the Commission refused to receive material of this nature and to give appropriate attention to the matters thus submitted. This procedure is made obligatory under the new Act, and in addition the record must show the ruling upon each finding, conclusion or exception presented.³¹ With regard to its decisions, the Commission, either in its findings or in separate opinions, seeks to make apparent the processes by which its conclusions are reached.

All decisions, whether recommended or initial, become a part of the record and include a statement of findings and conclusions with reasons therefor upon all material issues of fact, law or discretion presented in the record and the appropriate rule, sanction, relief or denial thereof. Insofar as the Federal Trade Commission is concerned, this procedure is new. Formerly the report of the trial examiner was served upon the Commission's attorney, the attorney for the respondents and upon respondents not represented by

³⁰ Rule XXII July 1, 1945.

³¹ Rule XXI Dec. 11, 1946.

counsel. Such former report was not, however, a part of the record,³² although, on review of the case, the trial examiner's report therein often was certified to the Circuit Court of Appeals with the record.

JUDICIAL REVIEW, SECTION 10

Section 10(c) of the Administrative Procedure Act provides that every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review, and that any preliminary, procedural or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action.

The respondent against whom a cease and desist order is issued under the Federal Trade Commission Act may obtain a review by filing in the appropriate Circuit Court of Appeals of the United States within sixty days from the date of service of such order a written petition praying that it be set aside.³³ When a copy of such petition is served upon the Commission, it certifies to the court a transcript of the entire record in the proceeding. The court has power to enter a decree based upon this record affirming, modifying or setting aside the order of the Commission and enforcing the same by issuance of its own order commanding obedience to the Commission's order to the extent that it has been affirmed. The judgment and decree of the Circuit Court are final except as they may be subject to review by the Supreme Court upon certiorari.³⁴

Such orders of the Commission to cease and desist become final if, upon expiration of the time allowed for filing a petition for review, no petition has been filed; or upon expiration of the time allowed for filing a petition for certiorari, if the Commission's order has been affirmed, or

³² Rule XX July 1, 1945.

³³ Section 5(c).

³⁴ Section 5(g).

the petition for review dismissed and no petition for certiorari has been filed; or upon denial of the petition for certiorari, if the Commission's order has been affirmed or the petition for review dismissed; or upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if the court directs that the Commission's order be affirmed or the petition for review dismissed.³⁵

If the Supreme Court directs that such order of the Commission be modified or set aside, the Commission's order issued in response thereto becomes final upon the expiration of thirty days from the time it is rendered unless within that time either party has instituted proceedings to have the order corrected to accord with the mandate, in which event the order becomes final when so corrected.³⁶

If such order of the Commission is modified or set aside by the Circuit Court of Appeals, and if the time allowed for filing a petition for certiorari has expired without such petition being filed, or if the petition has been denied or the decision of the Circuit Court has been affirmed by the Supreme Court, the order of the Commission rendered in accordance with the command of the Circuit Court of Appeals becomes final upon the expiration of thirty days from the time the order was rendered unless either party has instituted proceedings to have the order corrected to accord with the mandate, in which event it becomes final when so corrected.³⁷

If the Supreme Court orders a rehearing, or if the case is remanded by the Circuit Court of Appeals to the Commission for a rehearing, and if the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or if the petition has been denied, or if the decision of the Court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such

³⁵ Section 5(g).

³⁶ Section 5(h).

³⁷ Section 5(i).

rehearing becomes final in the same manner as though no prior order of the Commission had been rendered.³⁸

Any respondent who violates an order to cease and desist issued under the Federal Trade Commission Act after it becomes final and while it is in effect, becomes liable for the payment of a civil penalty of not more than \$5,000 for each violation, which sum may be recovered in a civil action brought by the United States.³⁹

The procedure with respect to the enforcement of orders to cease and desist issued in accordance with the provisions of the Clayton Act are outlined in Section 11 thereof.⁴⁰ When an order issued under the Clayton Act is not obeyed, the Commission may apply to the appropriate Circuit Court of Appeals for its enforcement. A complete transcript of the record, including the report or findings and the order, is filed with the court, which is empowered to make a decree affirming, modifying or setting aside the order. The findings of the Commission as to the facts, if supported by testimony, are conclusive. Similar provision (Sec. 5) in cases under the Federal Trade Commission Act reads "if supported by evidence."⁴¹ The decision of the Circuit Court is final except as it may be subject to review by the Supreme Court upon certiorari.

The party against whom an order to cease and desist has been issued under the Clayton Act may obtain a court review by filing a petition praying that the order of the Commission be set aside. Certification of the record and other procedural steps are the same as when application for enforcement is filed by the Commission.

This brief outline of provisions made in the Federal Trade Commission Act and the Clayton Act for judicial review of its orders to cease and desist shows the safeguards that have been placed about the Commission's procedure in con-

³⁸ Section 5(j).

³⁹ Section 5(l).

⁴⁰ 38 Stat. 734 (1914), 15 U. S. C. A. § 21.

⁴¹ 38 Stat. 719 (1914), 15 U. S. C. A. § 45(c).

nection with its formal cases. It would be idle to speculate at this time as to other possible forms of final agency action which might conceivably be subject to judicial review. The steps in this field must be taken, when necessary, in connection with individual cases and with the guidance and assistance of the courts. In this regard, as is the case with all other sections of the Act, the Commission will bend its efforts toward carrying out the intent and purposes of the Congress as therein expressed.

DISCUSSION PERIOD

FEBRUARY 6, 1947

The Session Convened at 8:00 p.m.

QUESTION: Mr. Freer, I have two questions I would like to ask you which occurred to me during the address. Both of them relate to Section 5 of the Act. The first is to Section 5(b) which provides for interested parties to have an opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment. You read from the Commission's new rules, and if I understood you correctly, there was a provision there providing for this procedure after issuance of complaint.

MR. FREER: Let me read that. The first provision is (b) of Rule 5, entitled "Complaints."

Upon request made within fifteen days after service of the complaint, any party shall be afforded opportunity for the submission of facts, arguments, offers of settlement or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

Did your other question relate to the trial examiner?

QUESTION: No. My point was this; I think you will agree that most parties or most persons whom the Commission

is investigating would much rather come in and submit their version of the facts and an offer of settlement before complaint than after complaint. Now, the Rule you have read only gives them the chance to do so after complaint.

MR. FREER: The Rules relate to formal procedure.

QUESTION: Yes. What I wanted to ask, though, is whether the Commission stipulation procedure has been loosened any since this Administrative Procedure Act came in?

MR. FREER: It has been described in the following language in Part 7, Organization, Procedure, Policy and Rules, Page 14239 of the Federal Register of December 11th.

The Commission, on December 5, 1946, amended its statement of organization, procedure, policy and rules . . . so that said sections shall read as follows, effective December 11, 1946.

7.9. Agreements to cease and desist on stipulated facts. (a) The Commission maintains a Division of Stipulations consisting of a Director, Assistant Director, and staff of attorney conferees.

(b) Whenever the Commission has reason to believe that any person has been or is using unfair methods of competition or unfair or deceptive acts or practices in commerce, and that the interest of the public will be served by so doing, it may withhold the issuance of a formal complaint and extend an opportunity to execute a stipulation satisfactory to the Commission, in which the proposed respondent, after admitting the material facts, agrees to cease and desist from, and not to resume such unfair methods of competition or unfair or deceptive acts or practices. It is not the policy of the Commission thus to dispose of matters involving intent to defraud or mislead; false advertisement of food, drugs, devices, or cosmetics which are inherently dangerous or where injury is probable; suppression or restraint of competition through conspiracy or monopolistic practices; violations of the Clayton Act; violations of the Wool Products Labeling Act of 1939 or the rules promulgated thereunder; or where the Commission is of the opinion that such procedure will not be effective in preventing continued use of the unlawful method, act, or practice.

The Commission reserves the rights in all cases, for any reasons which it regards as sufficient, to withhold this privilege. Stipulations after acceptance by the Commission are matters of public record. When a case is referred to the Division of Stipulations, that Division gives the proposed respondent notice of such reference, together with a statement of the alleged illegal acts, practices, or methods, and requests a reply within a specified period of time.

(c) The proposed respondent may reply by correspondence or upon his request, may confer with the Director of the Division of Stipulations, or with a designated attorney conferee either in person or through his authorized representative.

(d) If the proposed respondent enters into a satisfactory stipulation to cease and desist from such practices as the Director of the Division of Stipulations deems in accord with the Commission's direction, and to have been sufficiently substantiated by the investigational records and reports, or by the admissions of the proposed respondent, said stipulation is submitted to the Commission for its approval. In the event of failure of the proposed respondent to sign a satisfactory stipulation covering the charges which the Director considers to have been so substantiated, the Director then reports the matter to the Commission with recommendation as to what action is required in the public interest. He may recommend formal complaint or closing of the matter in whole or in part without prejudice to the right of the Commission to reopen the same at a later date, or other appropriate action.

That is what you refer to.

QUESTION: That is a considerable change in the elaboration of the old rule, and I had not heard it before. I do think, though, and it is my personal opinion, that it is within the spirit if not the letter of this Act, that similar stipulation procedure might well now be allowed in Clayton Act cases and conspiracy cases, and the cases which are within the list which the Commission still (in that rule) excepts from the stipulation procedure. I would like to ask whether the Commission has considered extending the stipulation procedure to that class of cases since the Administrative Procedure Act was passed?

MR. FREER: All I can say as to that, Mr. Austin, is that it went over it in detail in this statement of policy and reaffirmed such exceptions.

QUESTION: May I ask just one more question and that is: Under Section 5(d), has the Commission adopted any policy or expressed any policy as to the extent to which it will issue declaratory orders? Specifically, this is something that is never done. If some company is about to engage in an advertising campaign, and it has some advertising which it wanted to use but which it thinks its competitors would not like and may contend is unfair, may such a company come before the Commission and will the Commission, in such a case, consider the facts and issue a declaratory order so the advertiser would know either he could not do this or he could do this, and have the Commission's opinion? I assure you I am just using that as an example of what I mean, because I have always been very much interested, as you know, in declaratory judgments.

MR. FREER: We are not going into the business of issuing seals of approval.

QUESTION: Well, that was before this Act, I believe. But has there been any expression of policy on declaratory orders at all?

MR. FREER: The Commission has not availed itself of the opportunity to issue declaratory judgments.

QUESTION: So there is no indication yet as to how far it might go in that respect?

MR. FREER: I would say there is not much chance of issuing declaratory judgments for the reasons I spoke of. It is hard to cut them off in one field and grant them in another.

QUESTION: Commissioner Freer, may I ask how a practicing lawyer who may perhaps be unfamiliar with the

Administrative Procedure Act may proceed in a concrete way to use it in connection with the client's business? Is this interpretation correct? You take the Administrative Procedure Act and match it against the Rules promulgated by the agency. I will make it all inclusive. Not only the Federal Trade Commission, but other agencies of the government, and if the practicing lawyer then finds that the agency of the United States government has conformed to the Administrative Procedure Act, may he, from that point on, put this aside and operate exclusively under the Rules set forth in the Rules of Procedure of, let us say, the Federal Trade Commission? Or, is there some other way you can think of that the lawyer must, in fulfilling his duty to his client, continue to use the Administrative Procedure Act?

MR. FREER: Well, Ashley Seller says in this month's issue of the "American Bar Journal" that certain agencies have paid very little attention to the Administrative Procedure Act. I think, without mentioning names, they were not the quasi-judicial bodies like the Interstate Commerce Commission or the Federal Trade Commission. As to what should be done in any such instances you may find, I certainly would not want to give advice.

QUESTION: I was assuming the contrary. I was assuming that the agency had fully performed its duties.

MR. FREER: Well, they have published certain things in the Federal Register. You have Mr. Seller's opinion, however, that what they published has not complied fully with the Act. Some of them, he says, have referred to policies that never were published in the Federal Register—referred to policies, procedures or precedents that nobody therefore knows about, unless by accident. Some of them he states have described their procedure only in very general terms.

QUESTION: I am assuming the ideal state. Assuming

the situation where the attorney, looking at the two booklets, assumes that the agency has fully complied with the Federal Administrative Procedure Act. Under those circumstances, does this then become academic?

MR. MARKEL: I was thinking of an answer to the gentleman's question, and I think it is perhaps as simple as this, but I have been accused of oversimplifying things. The answer is this: Whenever a hearing is required, the Administrative Procedure Act prescribes the minimum requirements. Now, if the statute under which the matter arises requires something in addition to that, then you have to look to the statute.

Does that answer it more directly?

QUESTION: Yes, I think it does, and I think you confirmed my impression that once a practicing lawyer has decided that the independent agency has fully complied with their book, he can put it aside and forget it.

MR. MARKEL: Put it aside, and then look to the Act to see if there is anything more required.

MR. FREER: Thank you for being patient with me. I had to follow the outline which was furnished by the Dean of the School, and that make my talk a little ponderous in some spots. However, I thank you for bearing with me in carrying out my commitment to him, namely that I would follow the outline furnished by him. I think you will find that perhaps it is easier to read than to listen to. I hope so.

EFFECT OF THE ADMINISTRATIVE PROCEDURE ACT ON THE REGULATORY FUNCTIONS OF THE DEPARTMENT OF LABOR

JETER S. RAY

It has been said that the law of the jungle still governs in the field of international affairs and labor matters. Perhaps many of you have a feeling akin to that of being lost in the jungle when you are confronted with a matter before some of the federal administrative agencies. It is the belief of many of the people in and out of the Government with whom I have discussed the matter that one of the beneficial results of the Administrative Procedure Act will be the alleviation of some of the confusion and misunderstanding that exists in respect of administrative proceedings; that even though the labyrinth may not be cleared from the jungle, the Act will provide certain guideposts or beacons which will enable the average lawyer to find his way. I trust that I will be able to contribute something to your better understanding of the functions of the Department of Labor and how they are affected by this highly important new federal Act.

I

The regulatory functions of the Department of Labor and its bureaus are exercised in accordance with various statutes which they administer. These include, principally, the Davis-Bacon Act, 49 Stat. 1011 (1935), 40 U. S. C. A. § 276a; the Copeland Anti-Kickback Act, 48 Stat. 948 (1935), 40 U. S. C. A. § 276c; the Walsh-Healy Public Contracts Act, 49 Stat. 2036 (1936), 41 U. S. C. A. § 35; the Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U. S. C. A. § 201; and the Wagner-Peyser Act, 48 Stat. 113 (1935), 29 U. S. C. A. § 49.

The Davis-Bacon Act assigns the Secretary of Labor the duty of determining prevailing rates of wages which con-

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tractors (in contracts involving over \$2,000) must agree to pay laborers and mechanics employed in the construction, alteration or repair of public buildings or public works. A similar function is performed under Section 212(a) of the National Housing Act, 56 Stat. 303 (1942), 12 U. S. C. A. § 1715c, and Section 15(b) of the Federal Airport Act, 60 Stat. 170 (1946), 49 U. S. C. A. § 1101, and, in cases of disputes, under Section 3 of the Tennessee Valley Authority Act, 48 Stat. 59 (1933), 16 U. S. C. A. § 831b. As I shall point out later, there is some doubt as to whether the action of the Department pursuant to the Davis-Bacon type of statute is subject to the Administrative Procedure Act in any respect. It is generally agreed, in any event, that the only provisions conceivably applicable are those concerned with public information, that is, Section 3.

The Copeland Act, supplemented by Section 9 of Reorganization Plan No. IV, 54 Stat. 1236 (1941), 5 U. S. C. A. § 113t, in accordance with Section 4 of the act of June 4, 1940, 54 Stat. 231 (1940), 5 U. S. C. A. § 133u, makes it a criminal offense to induce persons employed on public construction to give up any part of the compensation to which they are entitled under their contracts of employment, and charges the Secretary of Labor with the issuance of regulations to aid in the enforcement of the Act. This informal rule making function is subject to the public information requirements of Section 3 of the Administrative Procedure Act.

The Walsh-Healy Public Contracts Act requires Government contracts, for the manufacture or furnishing of materials, articles, supplies or equipment in any amount exceeding \$10,000, to stipulate to the observance of certain fair labor standards. One such standard is the minimum wage determined by the Secretary of Labor to be the prevailing minimum wage for similar work in the same or similar industries in the locality. To enforce the Act against breaches or violations, the Secretary or his authorized

representative is empowered to hold hearings and make findings and decisions enforceable in the courts. The Secretary is authorized, under certain circumstances, to grant exceptions and exemptions from one or more of the requirements of the Act. The public information and adjudication features, including licensing, of the Administrative Procedure Act, as well as its provisions concerning judicial review, are applicable to the Public Contracts Act.

The Fair Labor Standards Act of 1938, commonly known as the Wage and Hour Law, is administered by the Administrator of the Wage and Hour Division of the Department of Labor. The Administrator's regulatory functions under this Act include, in the main, the definition of terms, the issuance of wage orders, the granting, renewal, cancellation and revocation of exemptions or tolerances, the regulation of record keeping, and the determination of certain conditions such as the seasonality of an industry or the reasonable cost to an employer of board, lodging, or other facilities furnished to employees. The administration of the child labor provisions of this Act, originally lodged in the Chief of the Children's Bureau, now rests with the Secretary of Labor under Reorganization Plan No. II, effective July 16, 1946, pursuant to the Reorganization Act of 1945, 59 Stat. 613, 5 U. S. C. A. § 133y. Among the Secretary's regulatory functions here are the informal rule-making functions of determining occupations hazardous to the employment of children between 16 and 18 years of age, regulating the issuance of certificates of age, and determining occupations in which the employment of children between 14 and 16 years of age does not constitute oppressive child labor. It thus appears that except for its formal adjudication provisions, the entire Administrative Procedure Act is applicable to one function or another in the administration of the Fair Labor Standards Act.

The Wagner-Peyser Act is a grant-in-aid statute. It provides for a United States Employment Service in the Department of Labor, to which State plans for the main-

tenance of public employment services are submitted for approval. After approving a state plan, the Secretary of Labor certifies for payments to the state, federal funds to finance the operation of the state service. Certifications may be revoked or withheld for cause. The Secretary of Labor is authorized to make such rules and regulations as are necessary to carry out the provisions of the act. The regulations under this act, representing the exercise of informal rule-making functions, are contained in parts 21 through 25 Title 29 of the Code of Federal Regulations. They describe the types of services which the states must render, provide for the coordination of the various state offices as parts of a national system of public employment offices, describe the materials to be included in state plans, the policies of the United States Employment Service, standards for merit systems in state employment service administration, and fiscal standards for the custody and expenditure of granted funds. The public information provisions of the Administrative Procedure Act are applicable here. As will be pointed out later some question exists as to whether the licensing provisions of Section 9(b) are also applicable.

While outlining the regulatory functions of the Department, it might be well to mention the Secretary's function of determining whether there is merit to the claim of a labor organization to participate in the selection of labor members of the National Railroad Adjustment Board. The pertinent provision of the Railway Labor Act may be found at 44 Stat. 578 (1925), 45 U. S. C. A. § 181, and 44 Stat. 1189 (1927), 45 U. S. C. A. § 153(f). It provides that in the event of a dispute as to the right of a labor organization to participate in the selection of labor members of the National Railroad Adjustment Board the Secretary shall investigate the labor organization's claim that it is national in scope. This normally will entail a hearing and if the Secretary determines the claim to be meritorious, he will issue a certificate of merit to the National

Mediation Board. The Mediation Board must then request duly qualified labor organizations to designate a representative who, together with a representative of the claimant and a neutral party named by the Mediation Board, shall investigate the claim and decide the issue. It is clear that this tripartite body is within the first exclusion mentioned in Section 2(a) of the Administrative Procedure Act. The exclusion of the Secretary's preliminary function then would seem to follow *a fortiori*. The requirements of Section 3, however, which are untouched by the exclusion for tripartite bodies, would appear to be applicable.

II

One or more of the public information provisions contained in Section 3 of the Administrative Procedure Act apply, of course, to all of the functions I have described, with the possible exception of those performed under the Davis-Bacon Act and similar statutes. For a clear understanding of the problem with respect to the latter, an example of the procedure usually followed is worth mentioning. Suppose a post office were about to be constructed in Racine, Wisconsin. The Davis-Bacon Act requires that the contracting agency of the Government include in the advertised specifications the minimum wage rates predetermined by the Secretary of Labor. Before publishing the invitations to bid, therefore, the contracting agency must ask the Secretary of Labor to fix the rates. The rates may apply to one or more contractors, depending on the size of the project, but their application does not extend beyond the project. It is important to distinguish in this connection the Walsh-Healy wage determinations which are industry-wide in scope. Since the duty of incorporating these rates in the contracts is imposed on the contracting agency, it has been urged that the function of the Secretary of Labor is a matter of internal management within the meaning of the second exception to Sec-

tion 3 of the Administrative Procedure Act. Those who take this position further point out that since prevailing rates in the locality are subject to frequency fluctuations, it sometimes happens that the rates set by the Secretary are not even used because by the time the contract is executed they are no longer the prevailing rates, and new rates have to be fixed. From this it is said to follow that the rates, when fixed by the Secretary, are not rules within the meaning of Section 2(c) and therefore not subject to Section 3 at all. Even if they are rules, the argument continues, they are, at most, rules addressed to named persons, i.e., the contractors, and thus, need not be published but merely made available to public inspection pursuant to Section 3(b). In any event, it is concluded, it was not intended by the Act to require publication of any matter already brought to the notice of all interested persons, and this has been done by publication of the specifications.

We have taken a middle ground on this question, holding that the Secretary's function is a rule-making one not within the exception for matters of internal management, but that the rates are rules addressed to and served upon named persons. We have therefore made them available to public inspection under Section 3(b). We were given material assistance in the determination of this question by the Solicitor General's office. The rules establishing the procedure for the making of these wage determinations, which Section 3(a)(2) of the act requires to be published, were published in 1935 and may be found in the Code of Federal Regulations as Part I of Title 29. But this part also includes several sections which are more of a substantive than procedural nature. The requirement in Section 3(a), therefore, of separate statements of organizational, procedural, and substantive rules caused us to add two new parts, one stating where the procedural rules may be found, and the other stating where the substantive rules may be found. These new parts contain identical statements with regard to the Copeland Act rules

which have appeared as Part 3 of Title 29 since 1942. I might observe here, parenthically, that similar new parts were adopted with respect to other portions of our regulations in order to conform to the separate statement requirement. The only other respect in which the Davis-Bacon and Copeland Acts were effected by Section 3 was insofar as the Secretary's delegations of final authority thereunder were required to be reflected in the organizational statement by Section 3(a)(1). These delegations are also recorded in parts 1 and 3 themselves.

The Wagner-Peyser Act regulations have required no material change as a result of the Administrative Procedure Act. However, they recently underwent wholesale revision by reason of the return of the public employment offices to the states.

The Labor Department's organizational statement, appearing in Part 2 of Title 29, is new, and was published as required by Section 3(a)(1). In like manner, Sections 3(b) and 3(c) are responsible for the new Sections 2.7 and 2.8 of Title 29 which set forth the Department's rules governing the availability of public records and other documents to members of the public. It should be noted, however, that Section 2.7 goes further than the requirement of Section 3(c) by making certain matters of official records, in addition to those affected by Section 3(b), available to public inspection by anyone. I refer to such matters as papers and documents made a part of the official record in proceedings in connection with the issuance, amendment, or repeal of regulations or determinations having general or industry-wide effect.

Section 3(a)(2) required one change in existing rules, namely, the publication of forms required to be filed, or their substance. The latter course seemed the more feasible and numerous amendments were inserted into the regulations of the Administrator of the Wage and Hour Division, which are contained in Chapter 5 of Title 29. These deal principally with the filing of application forms

for the issuance of special certificates under Section 14 of the Fair Labor Standards Act for learners, apprentices, messengers, and handicapped workers.

Section 3 also had an indirect effect in requiring publication of new rules adopted to comply with other sections of the Act. For example, the amendments adopted to conform to the thirty-day grace period provided by Section 4(c), as in the case of part 421 of the child labor regulations which provide for determination of hazardous occupations under the Fair Labor Standards Act; the amendments to the Wage and Hour Division's regulation, Parts 522 (learner certificates) and 526 (seasonal industry determinations) to provide for petitions for amendment in accordance with Section 4(d); the amendments to conform to the revocation of licenses requirements of Section (b), as in the case of Part 516, of the Wage and Hour Division's record-keeping regulations; the amendments to conform to Section 6(c) requiring the issuance of subpoenas in proper cases, as in the case of the Walsh-Healy Rules of Practice, Part 203 of Title 41, which had heretofore made the issuance of subpoenas a discretionary matter; and the amendment to Section VIII(g) of the Walsh-Healy rules of practice declaring it the policy to exclude irrelevant, immaterial, or unduly repetitious evidence, as provided in Section 7(c) of the Administrative Procedure Act.

Finally, Section 3(a)(3) introduced the requirement of the publication in the Federal Register of general statements of policy or interpretations formulated for the guidance of the public. Since it would be unrealistic to suppose that the publication of such statements at random in the Federal Register would afford much guidance to anyone, a codification plan was evolved with the advice and assistance of the Division of the Federal Register. The breakdown of the codification schedule corresponds roughly to the interpretative bulletins that have been

issued by the Department with which at least most lawyers concerned with labor matters have become familiar.

The principal agency in the Department of Labor to be affected by this provision will undoubtedly be the Administrator of the Wage and Hour Division. The first of the statements under this provision has already been published. It involves the withdrawal of the Administrator's nonenforcement policy against industrial laundries in view of the recent decisions of the Supreme Court. However, although the Administrator recently issued a much-publicized release dealing with the portal to portal problem it was not deemed necessary to publish the release in the Federal Register since the release expressly stated that no definitive guide could be laid down for the guidance of the public until the courts had clarified what aspects of travel time are compensable. Such release was merely commentary.

III

Of all the rule-making functions I have mentioned, the only ones subject to the rule-making provisions of the Administrative Procedure Act are those exercised under the Fair Labor Standards Act. These include, in addition to those of the Secretary described above, the following functions of the Administrator: The determination under Section 3(m) of the reasonable cost of board, lodging and other facilities, furnished employees; the issuance of regulations governing industry committees under Section 5(c); the fixing of homework rates in Puerto Rico and the Virgin Islands under Section 6(a)(5); the determination of industries of a seasonal nature under Section 7(b)(3); the definition of "area of production" under Sections 7(c) and 13(a)(10); the issuance of minimum wage orders pursuant to Section 8; the issuance of record-keeping regulations under Section 11(c); defining the terms "executive," "administrative," "professional," "local retailing," and "outside salesman" under Section 13(a)(1);

the issuance of regulations governing certificates for the employment at subminimum rates of learners, apprentices, messengers and handicapped persons under sections 13(a) (7) and 14; and the issuance of regulations restricting the employment of homeworkers.

All the other rule-making functions exercised in the Department are within the second exception to Section 4 as relating to public grants, in the case of the Wagner-Peyser Act, or to public contracts, in the other instances.

Of the rule-making functions under the Fair Labor Standards Act, the only one subject to Sections 7 and 8 of the Administrative Procedure Act is that concerned with the promulgation of wage orders. And this has present significance only for Puerto Rico and the Virgin Islands inasmuch as the Administrator's power to issue wage orders raising the minimum in particular industries has been superseded by the provisions of Section 6 of the Act which makes a 40-cent rate universally effective since October 24, 1945, except for Puerto Rico and the Virgin Islands. And even as to Puerto Rico and the Virgin Islands, the prospect of numerous future wage orders is not so clear as to warrant the adoption of rules of practice for general use.

The rules we adhered to until now were published with each notice of hearing and hence never codified in the Code of Federal Regulations. Indeed, we have not yet decided how to change our present system of decision making in wage order proceedings. Under this system a presiding officer designated by the Administrator submits a report of the proceedings but makes no recommendation with regard to the decision. The Administrator then issues his findings and opinion, and the wage order. Obviously, this procedure does not conform to the requirements of Section 8(a) of the Administrative Procedure Act. To comply, it will be necessary either for the Administrator himself to preside at the hearing or, if an examiner presides, for the latter to make the initial decision or to recommend a decision, or, if the Administrator makes the initial

issued by the Department with which at least most lawyers concerned with labor matters have become familiar.

The principal agency in the Department of Labor to be affected by this provision will undoubtedly be the Administrator of the Wage and Hour Division. The first of the statements under this provision has already been published. It involves the withdrawal of the Administrator's nonenforcement policy against industrial laundries in view of the recent decisions of the Supreme Court. However, although the Administrator recently issued a much-publicized release dealing with the portal to portal problem it was not deemed necessary to publish the release in the Federal Register since the release expressly stated that no definitive guide could be laid down for the guidance of the public until the courts had clarified what aspects of travel time are compensable. Such release was merely commentary.

III

Of all the rule-making functions I have mentioned, the only ones subject to the rule-making provisions of the Administrative Procedure Act are those exercised under the Fair Labor Standards Act. These include, in addition to those of the Secretary described above, the following functions of the Administrator: The determination under Section 3(m) of the reasonable cost of board, lodging and other facilities, furnished employees; the issuance of regulations governing industry committees under Section 5(c); the fixing of homework rates in Puerto Rico and the Virgin Islands under Section 6(a)(5); the determination of industries of a seasonal nature under Section 7(b)(3); the definition of "area of production" under Sections 7(c) and 13(a)(10); the issuance of minimum wage orders pursuant to Section 8; the issuance of record-keeping regulations under Section 11(c); defining the terms "executive," "administrative," "professional," "local retailing," and "outside salesman" under Section 13(a)(1);

the issuance of regulations governing certificates for the employment at subminimum rates of learners, apprentices, messengers and handicapped persons under sections 13(a) (7) and 14; and the issuance of regulations restricting the employment of homeworkers.

All the other rule-making functions exercised in the Department are within the second exception to Section 4 as relating to public grants, in the case of the Wagner-Peyser Act, or to public contracts, in the other instances.

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The rules we adhered to until now were published with each notice of hearing and hence never codified in the Code of Federal Regulations. Indeed, we have not yet decided how to change our present system of decision making in wage order proceedings. Under this system a presiding officer designated by the Administrator submits a report of the proceedings but makes no recommendation with regard to the decision. The Administrator then issues his findings and opinion, and the wage order. Obviously, this procedure does not conform to the requirements of Section 8(a) of the Administrative Procedure Act. To comply, it will be necessary either for the Administrator himself to preside at the hearing or, if an examiner presides, for the latter to make the initial decision or to recommend a decision, or, if the Administrator makes the initial

decision without a recommendation by the examiner, the Administrator will first have to issue a tentative decision.

Except for this, however, the 30-day grace period required by Section 4(c), and two rules in connection with the conduct of the hearing, no changes will be necessary. The two latter changes are first, pursuant to Section 7(c), providing as a matter of policy for the exclusion of irrelevant, immaterial or unduly repetitious evidence, and secondly, pursuant to Section 6(c), making the issuance of subpoenas mandatory in proper cases.

The other rule-making functions under the Fair Labor Standards Act are subject either to Section 4 only, or are not subject to any rule-making requirements at all if they are rules of organization, procedure or practice. If they are subject to Section 4, the only additional respect in which any change in existing rule-making practice is required is the incorporation in the rules of a concise, general statement of their basis and purpose.

A recent example of the incorporation of such a statement appears in the Administrator's redefinition of the term "area of production" under Sections 7(c) and 13(a)(10) of the Fair Labor Standards Act (11 F. R. 14648). Although not required by the Act, because the redefinition proceedings were initiated long prior to September 11, 1946, the effective date of the requirement, nevertheless in order to comply with the spirit of the Act and to continue past practice, a concise general statement of the basis and purpose of the rule was inserted in the redefinition.

IV

Turning to the adjudicatory procedures or "judicial" functions exercised by the Secretary of Labor and the Bureaus and Divisions in the Department of Labor, we find there are two distinct types of such procedures: (a) "Informal" procedures where the statute administered does not require agency action "on the record after oppor-

tunity for an agency hearing," and (b) "Formal" procedure where the statute administered in the Department does require such hearing.

Typical of the "informal" adjudicatory proceedings are those for the issuance, renewal, cancellation, or revocation of special certificates authorizing the payment of sub-minimum rates of pay to learners, apprentices, messengers, handicapped persons and sheltered workshop clients under Sections 13(a)(7) and 14 of the Fair Labor Standards Act. Pursuant to regulations issued by the Administrator, special certificates are issued by the Exemptions Branch of the Wage and Hour Division only "to the extent necessary in order to prevent curtailment of opportunities for employment." (Section 14.) Application for special certificates may become the subject of individual determination or may be the occasion of a determination to prescribe regulations for an industry.

Other similar licensing procedures include those in connection with homework certificates; exceptions to the record-keeping regulations under the Fair Labor Standards Act; and exceptions and exemptions under the Walsh-Healey Act.

In most respects regulations in existence at the time the Administrative Procedure Act became effective were in accord with its requirements. To bring the regulations into full compliance with Section 9(b), however, it was deemed necessary to amend the regulations generally in two major respects:

- (a) To provide, prior to revocation of any license, an opportunity to demonstrate or achieve compliance; and
- (b) To prevent expiration of any license until determination of application for renewal duly and timely filed.

The former, of course, is not intended to apply to any situation excepted by Section 9(b). Thus, the public interest exception would exclude from the requirement to afford an opportunity to show compliance the wholesale amendment or revocation of certificates for the purpose of effec-

tuating higher rates on the ground that the rates provided in the outstanding licenses are no longer necessary to prevent curtailment of opportunities for employment.

The applicability of Section 9(b) to the procedures in connection with the approval of state employment service plans or the withholding of grants to states under the Wagner-Peyser Act is a matter on which we have not yet found it necessary to take a definite position. The principal consideration is whether the approval is a "license required by law." Strongly militating against the view that Section 9(b) would be applicable is the fact that state agencies are completely free to operate without such approval precisely in the manner they would with approval, the only difference being that they would have to finance their own services. Only if they elect to seek federal funds is it necessary for them to submit their plans for approval. In any event, the regulations of the United States Employment Service, no less than their administration, are entirely consistent with the principles and objectives of the Act.

Part 401 of the child labor regulations presents an interesting situation in considering the licensing problem. Section 3(1) of the Fair Labor Standards Act grants immunity to an employer for the employment of oppressive child labor to the extent that he had on file an unexpired approved certificate certifying that the employee named therein is above the oppressive child labor age. A certificate issued pursuant to part 401, therefore, may in effect, be a license to employ underage children. However, since the purpose of the statute was to insure the non-employment of children below the prohibited ages, and age certificates need not be on file if in fact the employees are of age, we are of the view that age certificates are not licenses "required by law" within the meaning of Section 9(b).

Certain of the regulations I have discussed, particularly those dealing with learners, apprentices, and handicapped persons, have been adapted by the Secretary of Labor to

the exemptions and exceptions he is authorized to grant pursuant to Section 6 of the Walsh-Healey Act. To the extent that they do apply, the amendments mentioned are, of course, likewise applicable.

One of the principal "judicial" functions of the Department is the "formal" proceeding in cases arising under Section 5 of the Walsh-Healey Public Contracts Act which provides for an administrative hearing upon complaint issued by the Secretary of Labor to determine the facts and the amount of liquidated damages, if any, for violation of minimum wage, overtime, child labor, or other representations and stipulations contained in the act or Government contract. Power to determine whether there has been violation of the Act rests with the Secretary of Labor or any "impartial representative designated by him." By Administrative Order the Secretary has delegated authority to the Administrator of the Wage and Hour and Public Contracts Divisions to make final and binding decisions. The initial decision making authority rests with the Trial Examiners.

The procedures for the conduct of "formal" proceedings under the Public Contracts Act were originally designed to conform with the basic requirements and safeguards which have been incorporated in the Administrative Procedure Act. Nevertheless, to insure full compliance with the Act as finally passed by Congress, certain changes were made in the statement of organization and the Rules of Practice governing these formal proceedings. Thus, Section 5(b) of the Procedure Act requires the agency to provide the respondent with an opportunity for "the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment," time and the public interest permitting. More adequately to conform to this requirement, the Rules of Practice have been revised by adding Rule VII entitled "Prehearing Conferences" which provides for preliminary informal conferences between the parties and the Trial Examiner

to consider such matters as simplification of issues, the necessity or desirability of amending the pleadings, obtaining stipulations of fact or admissions of authenticity of documents, limitation of the number of witnesses, and any other matters which would tend to expedite the disposition of the proceedings.

Clearly, the purpose of Section 5(c) of the Administrative Procedure Act providing for "Separation of Functions" is to separate the trier of fact from the prosecutor along the lines indicated in the majority view contained in the Final Report of the Attorney General's Committee on Administrative Procedure (pp. 55-60), namely, an internal separation of functions within the agency. The organization of the Department is calculated to accomplish this purpose. The Administrator has been constituted an "agency," he having been delegated final decision making power, and therefore is exempt from the requirements of Section 5(c). The attorneys in the Solicitor's Office who analyze the records and assist the Administrator in preparing his decisions are in a separate section of the Solicitor's Office and neither they nor the Solicitor participate in any way in the investigation or prosecution of cases under the Walsh-Healey Act.

Since the Walsh-Healey Act itself requires the Secretary to designate an "impartial representative" to hold the hearings, one of the fundamental objectives of Section 5(c) was a requirement prior to the Administrative Procedure Act. In this connection I might point out that in December 1939, the staff of the Attorney General's Committee completed a detailed investigation of the Division of Public Contracts. In its Monograph No. 1 (Sen. Doc. No. 186, 76th Cong., 3d Sess., 1941), the committee made reference to the internal separation of functions existing within the Department of Labor and commented (p. 31 of mimeographed report) that "The Division has, one may safely assert, succeeded in surrounding the examiner at the hearing with an aura of judicial respectability." The

Secretary of Labor follows the practice of designating as the presiding officer at the hearing, a trial examiner located in a branch of the Solicitor's Office, the Legislative and Trial Examining Branch, which performs no investigative or prosecuting functions or indeed any other functions in connection with the Walsh-Healey Act. However, in order further to insure complete independence of the trial examiners from such officers or employees as are engaged in the performance of investigatory or prosecuting functions, the Rules of Practice have been amended by adding subsections (b) and (c) to Rule VIII. Subsection (b) provides:

1. The trial examiners shall perform no duties inconsistent with their duties and responsibilities as examiners. Save to the extent required for the disposition of *ex parte* matters as authorized by law, no trial examiner shall consult any person or party as to any fact in issue unless upon notice and opportunity for all parties to participate.

Subsection (c) provides:

Trial examiners shall act independently in the performance of their functions as examiners and shall not be responsible to, or subject to, the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Department of Labor in the enforcement of the Public Contracts Acts.

The statement of organization published in the Federal Register pursuant to Section 3(a)(3) of the Administrative Procedure Act has also been revised to reflect compliance with the requirements of Section 5(c) (11 Fed. Reg. 14485).

Other changes made in the Rules of Practice governing these formal procedures under the Walsh-Healey Act may be summarized as follows:

Rule VI conforms with the requirement of Section 6(c) of the Administrative Procedure Act which requires agencies to issue subpoenas to any party upon request

and upon a statement of showing of general relevance and reasonable scope of the evidence sought. Previously, the issuance of subpoenas was merely permissive under the rules.

Rule VIII(a), by requiring Trial Examiners to be assigned to cases in rotation so far as practicable, conforms to Section 11 of the Act, while its limitation on substitution of Trial Examiners to situations where they are not available guarantees compliance with the first sentence of Section 5(c).

Rule VIII(g) has been amended to conform with Subsection 7(c) which provides that any oral or documentary evidence may be received generally but that every agency as a matter of policy, should provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

Rule IX(a), entitled "Briefs," provides that any interested party may file, in addition to briefs and other written statements, proposed findings of fact or conclusions of law, pursuant to Section 8(b) of the Administrative Procedure Act.

Rule X(a), by providing that the Trial Examiners' decision shall remain inoperative unless and until it becomes final, is designed to prevent any possible judicial review which Section 10(c) of the Administrative Procedure Act might otherwise allow pending appeal to the Administrator.

Rule XI(a) of the Rules of Practice as revised reflects the change effected by the Secretary's order delegating authority to the Administrator of the Wage and Hour and Public Contracts Divisions to make investigations and final and binding decisions in formal adjudicatory proceedings under the Walsh-Healy Act. An appropriate amendment has also been made to the statement of organizations published in the Federal Register (11 Fed. Reg. 14485).

Rule XI(g) of the revised Rules of Practice provides that application for relief from the ineligible list provi-

sions of Section 3 shall be filed by the respondent with the Secretary of Labor within twenty days from the date of service of the Trial Examiner's decision or the Administrator's decision, as the case may be. Rule XI(h) provides that notice of the Secretary's determination on the application of the ineligible list provisions of Section 3 shall be served on parties who were served with copies of the Trial Examiner's or Administrator's decisions.

Section 9 bears the general title of Sanctions and Powers. Section 9(a) provides generally that no sanction shall be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law. This appears to be a restatement of the well-recognized law hitherto consistently applied by the courts. The Walsh-Healy Act contains no criminal sanctions. It provides in Section 2 that disregard of any of the required stipulations in the Government contracts covered by the Act shall subject the contractor to a civil action instituted by the Attorney General for the recovery of liquidated damages, and, if the Government chooses to cancel the contract, for any additional cost thereby entailed. Section 2 further provides that the Government may withhold from any balance due to the contractor a sum equal to the amount of any underpayment of wages owed by the contractor to any employee who has participated in the performance of the contract. Sums so withheld or recovered are retained by the Secretary of Labor in a special deposit account for payment directly to the affected employees. In addition, for violations of the child labor provisions of the Act, the contractor is liable for liquidated damages in the amount of \$10.00 per day for each minor unlawfully employed. Section 3 provides that contractors found by the Secretary to have violated the Act shall be placed on an ineligible list for a three-year period unless the Secretary recommends otherwise. Since the only sanctions imposed under the Walsh-Healey Act are

those specifically enumerated in the statute, there would appear to be full compliance with Section 9(a).

V

We come now to the judicial review provisions of the Act. Section 10 covers the right to judicial review, the form and venue of proceedings for such review, agency action which is reviewable, the granting of *interim* relief, and scope of judicial review. The Attorney General in approving the revised Committee Print of the bill—for all practical purposes identical with the act as passed—stated that his approval was based in part upon his conclusion that Section 10 restated existing law on judicial review (Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) pp. 224, 229-230). This statement was appended to the Senate Committee Report. When the bill was passed by the House, Representative Hobbs of Alabama extended his remarks in the Congressional Record by inserting the above statement as well as a memorandum in which the Department of Justice clearly reiterated the view that the judicial review provisions of the Act were intended to restate in statutory language the law on judicial review as expressed in the statutes and in the Supreme Court decisions (Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) pp. 406-415). We agree with the Attorney General's conclusion as it applies to the various statutes administered in the Department of Labor. Thus, with respect to judicial review of such rule-making functions as the issuance of minimum wage orders under the Fair Labor Standards Act, minimum wage determinations under the Walsh-Healey Act, and prevailing minimum wage determinations under the Davis-Bacon Act, it is our view that the Administrative Procedure Act effects no changes as to either the right of review or the scope of review.

Section 10(a) of the Fair Labor Standards Act specifically provides that "any person aggrieved by an order of the Administrator, issued under Section 8 may obtain

a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part." It provides, further, that "the review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive." The procedures of the Department with respect to wage order proceedings were tested and found fully adequate in *Opp Cotton Mills v. The Administrator*, 312 U. S. 326, 61 Sup. Ct. 524, 85 L. ed. 624 (1941).

The phrase "substantial evidence," according to the Committee Reports, means evidence which, on the whole record, is clearly substantial, sufficient to support a finding or conclusion under Section 7(c) dealing with evidence. Section 7(c) provides that no sanction shall be imposed or rule or order be issued except as supported by and in accordance with the "reliable, probative, and substantial evidence." It might seem, therefore, that Section 10 confers on the courts the power to consider on review the reliability, i.e., the credibility of the evidence. That this was not intended, however, is clear from the statements in the Committee reports, emphasizing the weight to be accorded to hearing officers' determinations of credibility (Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) pp. 210, 272). It is our view, therefore, that Section 10 is intended to simply embody the law as declared in *Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197, 59 Sup. Ct. 206, 83 L. ed. 126 (1938), in which the court merely held that while technical rules of evidence are inapplicable to administrative proceedings hearsay or rumor requires some corroboration.

Unlike the specific provisions for review of wage orders

under the Fair Labor Standards Act, the Walsh-Healey Public Contracts Act does not, in terms, either grant or deny judicial review of minimum wage determinations issued by the Secretary of Labor. However, in the case of *Perkins v. Lukens Steel Company*, 310 U. S. 113, 60 Sup. Ct. 869, 84 L. ed. 1108 (1940), the Supreme Court denied judicial review of such agency action because the complaining parties, prospective or potential sellers to the Government, were not subject to the Walsh-Healey Act and therefore had no standing in court to attack the wage determination, and because opportunity for review would unduly interfere with the execution of Government contracts. The Court stated the governing principle to be as follows:

We are of the opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based. It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. . . . Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law. (p. 125.)

It would appear that similar reasoning would preclude judicial review of the prevailing minimum wage determinations under the Davis-Bacon Act.

On the other hand, Section 10(c) of the Administrative Procedure Act provides that every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy shall be subject to judicial review. Does this provision overrule the *Lukens Steel* case? We think not. The agency action made reviewable by this section must be interpreted in the light of the jurisdictional limitations placed upon the courts by Section 2 of Article III of the Constitution. Jurisdiction therein is confined to the hearing of cases and controver-

sies. Thus, a person aggrieved by agency action may obtain review only if he can make out a case or controversy. Under the doctrine of the *Lukens* case, one who is not subject to the Walsh-Healey Act cannot show legal wrong and has no standing to sue. In other words, since the agency action was not constitutionally justiciable it was not reviewable. Beyond the constitutional question of the jurisdiction of the courts to review agency action which is not justiciable, we are of the opinion that the terms "aggrieved" and "adversely affected," as used in Section 10(a) of the Administrative Procedure Act, merely state in statutory form the interpretation placed on them by the Supreme Court in *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 60 Sup. Ct. 693, 84 L. ed. 869 (1940).

In the Attorney General's discussion of Section 10(a) in the course of which he stated that the subsection "reflects existing law," one of the half dozen cases cited by him to support his thesis was the *Lukens* case (Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946), p. 230).

We conclude, therefore, that wage determinations cannot be attacked by persons not subject to the Walsh-Healey Act or the Davis-Bacon Act. Whether wage determinations under these acts may be reviewed at the instance of parties subject to them is another question. In this connection it may be noted, first, that under both acts, contractors may be held to be estopped from challenging a wage determination since bids are made and contracts executed between the Government and the contractor on the basis of the wage determination; and second, that in the absence of estoppel a contractor has an adequate remedy since he could raise his defenses in an action instituted by the Attorney General under Section 2 of the Act to enforce the administrative findings.

Another question raised by Section 10(e) of the Administrative Procedure Act is whether advisory or interpretative opinions, issued by the Department, are directly

reviewable. Such advisory or interpretative opinions indicate merely the Department's present belief concerning the meaning of applicable statutory language. They have no force and effect of law and are not binding upon the courts although the Supreme Court has said they are entitled to great weight. It is clear, therefore, that such advisory or interpretative opinions do not themselves create any rights or liabilities. Accordingly, they constitute neither rules nor orders as defined in Section 2 and do not come within the meaning of any other kind of "agency action" as defined in Section 2(g). Accordingly, it is our view that advisory or interpretative opinions are not directly reviewable by the courts.

With respect to the judicial review of adjudicatory proceedings of the Wage-Hour and Public Contracts Divisions, it is a matter of some question whether refusal to issue learner, apprentice, handicapped worker and other similar certificates to permit the payment of wages at subminimum rates is an exercise of administrative discretion conferred under Section 13(a)(7) and 14 of the Fair Labor Standards Act, similar to that exercised by the National Labor Relations Board in denying the issuance of a complaint, and hence not reviewable by the courts under the second exception to Section 10; or whether it is a "legal" discretion, within the distinction made by the Third Circuit Court of Appeals in *Jacobsen v. National Labor Relations Board*, 120 F. (2d) 96, 100, (C. C. A. 3d, 1941), so that the Administrator may be answerable for its abuse. The line is not an easy one to draw.

Similar considerations apply to the exceptions and exemptions issued by the Secretary pursuant to Section 6 of the Walsh-Healey Public Contracts Act.

To the extent that any agency action in connection with licenses or with the formal adjudicatory proceedings of the Department may have been subject to judicial review prior to the enactment of the Administrative Procedure Act it remains so reviewable.

An interesting aspect of this problem is the first exception to Section 10 and its applicability to all agency action under the Fair Labor Standards Act except the issuance of wage orders and to all agency action under the Walsh-Healey Act except the formal adjudication of cases. These specific matters, it is to be remembered, are the only forms of agency action of which the respective statutes provide judicial review. In this respect they would appear to be analogous to the National Labor Relations Act which provides review only of unfair labor practice orders. In this connection the Attorney General has asserted that the case of *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 60 Sup. Ct. 300, 84 L. ed. 347 (1940), represents an example of an interpretation of a statute manifesting a congressional intention to preclude judicial review (Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) pp. 229-230). That case held, it will be recalled, that no review lay in the Circuit Court of Appeals under Section 10(f) of the National Labor Relations Act from orders of the Board certifying collective bargaining representatives pursuant to Section 9(c) of the Act, except incidentally to review of unfair labor practice enforcement orders.

The judicial review question also arises indirectly in considering the extent of judicial inquiry in passing on the validity of subpoenas under Section 6(c). This section provides, *inter alia*, that upon contest for the enforcement of a subpoena it shall be sustained to the extent that the court finds it to be "in accordance with law." Does this provision overrule *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 63 Sup. Ct. 339, 87 L. ed. 424 (1943), and *Oklahoma Press v. Walling*, 327 U. S. 186, 66 Sup. Ct. 494, 90 L. ed. 436 (1946)?

Congressman Walter, in discussing this provision on the floor of the House, said (Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) at 363):

The effect of the subsection is thus to do more than merely

restate the existing constitutional safeguards which in some cases, such as those involving public contractors—see *Endicott Johnson Corp. v. Perkins* (317 U. S. 501, 507, 509, 510 (1943)), have been held inapplicable. Also, the term “in accordance with law” does not mean that a subpoena is valid merely because issued with due formality. It means that the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpoena is directed are within the jurisdiction of the agency which has issued the subpoena.

Such a construction of Section 6(c) would seem to substitute the courts for the Secretary and the Administrator as the fact-finding agency in jurisdictional matters. As pointed out by the Supreme Court in the *Endicott Johnson and Oklahoma Press* cases, however, judicial review as to the facts as to jurisdiction at this stage puts the agency at a distinct disadvantage since the agency could, at the pleasure of the private parties, be prevented from obtaining the very facts which would support its jurisdiction. Moreover, judicial review of administrative jurisdiction on the merits at this state would constitute an unnecessary duplication of judicial proceedings since the issue of jurisdiction may be determined on judicial review of the final administrative action taken when all the facts are in. Recognition of these factors dissuaded the House Committee from Mr. Walter's view, for its report (Sen. Doc. No. 248, 79th Cong., 2d Sess. at 265) states:

The section constitutes a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction, in connection with any agency function or authority. It does not mean that upon contest courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance; they should instead inquire generally into the legal and factual situation and be satisfied that the agency could lawfully have jurisdiction.

The report of the Senate Judiciary Committee appears even to take a broader view. See Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) at 206 where it is stated:

The subsection constitutes a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction. This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should, instead, inquire generally into the legal and factual situation and be satisfied that the agency could not possibly find that it has jurisdiction.

Even this view has broadened by the Attorney General who stated in his comments on the revised Committee print that the provision in question "is intended to state the existing law" (Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) at 227), and stated the following in his memorandum placed in the record by Congressman Hobbs:

This provision is not intended to change the laws as expounded in *Endicott Johnson v. Perkins* (317 U. S. 501, 1943), in which the Supreme Court held that subpoenas issued by an agency will be accorded due respect by the Court if they are within the agency's power and that there would be no independent inquiry as to whether the particular person subpoenaed comes within the coverage of the act enforced by the agency. The law as expounded in *Endicott Johnson v. Perkins* is still applicable. All that this section requires is that the court determine whether the subpoena issued comes within the general power of that agency. There need be no in limine inquiries as to whether the person subpoenaed is or is not covered by the act.

It is our conclusion, therefore, that there appears to be nothing in this subsection which would confer upon the district courts any greater authority than was allowed them in the *Endicott Johnson* and *Oklahoma Press* cases which adhered to "general relevance and reasonable scope" as the proper tests.

In conclusion, there appear to be few innovations in the Administrative Procedure Act insofar as it applies to the statutes administered by the Department of Labor. Where the Act required changes to be effected in the rules

and procedures of the Department, such changes have been made. Thus, the public information requirements have resulted in publication in the Federal Register of additional information not required by the Federal Register Act. Certain changes have been effected to insure separation of functions in formal adjudicatory proceedings. Rules of Practice have been revised to conform to the requirement that the rights of private parties to the issuance of subpoenas be equal to those of agency officials. Decision of Trial Examiners in formal proceedings under the Walsh-Healey Act are now entitled to greater weight than they previously had. As to the limitation upon sanctions required by Section 9(b), regulations of the Department have been amended to provide that except in designated cases of urgency, the withdrawal of existing licenses shall not be made except after opportunity for corrective action has been granted to the licensee. These have been the more important effects of the Administrative Procedure Act upon the functions performed by the various agencies in the Department of Labor.

DISCUSSION PERIOD

FEBRUARY 7, 1947

The Session Convened at 4:00 p.m.

QUESTION: If I understood correctly, the Department of Labor has designated the Administrator of the Wage and Hour Division as an agency. Why did the Department feel it necessary to do that?

MR. RAY: That was done for practical reasons. The Secretary of Labor is, as you know, kept very busy on other things. Therefore, for practical reasons, and since he did not want to take up the time required to write his own decisions, he delegated the authority under the act to the Administrator.

QUESTION: Well, is not that just the sort of thing the Act sought to avoid? What would prevent the Department from naming any bureau chief as an agency and, in that way, avoid the spirit of Section 5(c) in regard to separation of functions?

MR. RAY: I think you probably could argue that point. However, I think it depends upon the construction of the statute because, as you will recall, in the definition of an "agency," it is specifically provided that it was not intended to repeal existing provisions of law for the delegation of authority. So the action of the Secretary, if he had that authority, in delegating it to somebody would not, in and of itself, be outlawed, you might say, by the Administrative Procedure Act. That is as good an answer as I can give you on the question.

QUESTION: I wonder if you would elaborate a little on a statement you made toward the end. I think you said that it was the Department's position that advisory or interpretative opinions were not reviewable, and I think that the Department's position was that it is the Labor Department's view of the moment. Well, then, what is the Department's stand on action taken, we will say, by an industry or by an employer under an advisory or interpretative opinion? Does it, the Department, consider itself estopped in a future action, we will say, on sanctions, or something, if the Department sees fit to change its position later on?

MR. RAY: Yes, they have done that in the past. I assume it will be continued. As a matter of fact, usually when there is a change in their position, they have, in the past, announced and probably would be compelled now to announce, that it would have no retroactive effect; that, for enforcement purposes, it would only go into effect at some subsequent date. The Department has considered itself estopped as far as its own independent enforcement action is concerned, provided its own interpretation was followed.

QUESTION: How about some other agency of the government, though, that took a different position, as you say, so far as itself was concerned? What about another agency in a different position? Would the Department come to the defense of the corporation acting on reliance of an advisory or interpretative opinion?

MR. RAY: I do not know how far they could go. I assume they would bring all the moral suasion they could on the other agency. I do not know of any instances where that has happened; where the Department of Labor has had its interpretation of that. I do recall instances where the Department of Labor found that some other government agency had advised concerns contrary to the position the Department of Labor took, and the Department of Labor, of course, depending on circumstances, refrained from taking action where those equities were in favor of the person who was on the carpet in the matter—at least, as far as the past is concerned. Of course, they would usually insist that, in the future, the matter was to be handled properly.

QUESTION: Mr. Ray, since the interpretative opinions of the Department are, in your opinion, not reviewable, and since, in the opinion of the court, they are entitled to great weight, those opinions amount to law because any employer acting contrary to such opinion would do so at his peril. Do you not think that, under the circumstances, those opinions should be reviewable when issued so that any industry or employer disagreeing with them should have an opportunity to clear that before taking the risk?

MR. RAY: I think that would be a fairly desirable situation. However, my point is that it has not been the case and is not the case under the existing provisions of the Administrative Procedure Act.

QUESTION: The opinion that they are not reviewable under that section is whose opinion?

MR. RAY: It is our—

QUESTION: It is your opinion?

MR. RAY: It is my personal opinion.

QUESTION: In other words, it is still open for somebody to attempt to review it?

MR. RAY: Certainly.

As a matter of fact, you may know the Administrator of the Wage and Hour Division has asked Congress to give him authority to make binding interpretations. That is, interpretations that would be reviewable by the courts, but until they were reviewed by the courts, they would be binding on any person who acted pursuant to them. He has that authority under certain provisions of the Act. For example, he has authority to define what is an administrative or executive employee. Now he thinks it would be very desirable, not only from his standpoint, but industry and labor both, and the public, if he were given authority to make binding interpretations subject to review by the courts.

THE LABOR BOARD AND THE ADMINISTRATIVE PROCEDURE ACT

GERARD D. REILLY

While the legislative history of the Federal Administrative Procedure Act is studded with references to the National Labor Relations Board, it appears that this legislation in the form ultimately agreed upon by the House and Senate conferees and approved by the President will make relatively minor changes in the procedures and rules of practice of that agency. As you know, the principal duty of the Board is to administer the National Labor Relations Act of July 5, 1935, popularly known as the Wagner Act (49 Stat. 449, 29 U. S. C. A. §§ 151-166). This is not the only Federal statute with which the National Labor Relations Board is concerned but it is the only one within the scope of this discussion. The Board is also charged with the administration of Section 222(f) of the Communications Act which contains certain labor provisions with respect to the merger of telegraph carriers. These amendments to the Communications Act gave employees affected by the consolidation of the Western Union and Postal Telegraph systems certain rights to tenure of employment, compensation, and dismissal wages and designated the NLRB as the agency to enforce them. Since most of these provisions, however, will be obsolete by October 1947, and since little litigation has arisen under their provisions, I have not thought it worthwhile to discuss the impact of the Administrative Procedure Act upon this statute. For similar reasons I shall not describe the Board's administration of Section 7(b) of the Fair Labor Standards Act, which exempts companies from the application of the 40-hour week established by that statute if there has been a collective bargaining agreement between that company and "representatives of employees certified as *bona fide* by the National Labor Relations Board," pro-

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viding that in any period of 26 weeks no person shall be employed for more than 1,000 hours.

The National Labor Relations Act has been frequently referred to as a statute which extends the principles of the Railway Labor Act to industrial employments affecting interstate commerce. While there is superficial resemblance between the two statutes, they differ sharply in that the Wagner Act has no provisions with respect to mediation or to the settlement of grievances. Moreover, this statute did not evolve from the Railway Act, but from a section of the National Industrial Recovery Act of 1933 known as Section 7(a), which gave employees the right to join or form labor organizations, to engage in other activities for mutual aid and assistance, and to be free from discrimination by their employers as a result of such activities. Under that Act it was mandatory that every code of fair competition should contain an agreement by the industry involved to respect these guarantees.

During the NRA period, a tri-partite board was set up to hear complaints arising out of violations of these code provisions. The board had no powers other than to recommend to the NRA that a violator be punished by revocation of the Blue Eagle, and that the compliance division should institute appropriate legal proceedings. This board was headed by Senator Wagner and the industry and labor members included such celebrities as William Green, John L. Lewis, Gerard Swope and Irene Dupont. Needless to say, it became increasingly difficult to obtain a quorum of such busy gentlemen for board meetings so that the real policies of the board tended to be made by the staff.

At the 2d Session of the 73rd Congress, Senator Wagner introduced a bill to remedy this situation. His measure, originally entitled the "Labor Disputes Bill," contemplated the appointment of a fulltime board with authority to obtain judicial assistance to enforce its orders. That Congress adjourned without taking any final action on this measure, but it did pass a resolution authorizing

the President to create special boards in the Department of Labor for cases arising under Section 7(a). This measure, under which a board of three was established, was the real genesis of the present National Labor Relations Act, for when Senator Wagner reintroduced his bill at the next session of Congress in 1935, the more important rules of decision of the new board were incorporated in his bill. Although the revised measure was favorably reported by the Senate Committee on Education and Labor and passed by the Senate, no action was taken on it in the House for several months. After the Supreme Court invalidated the National Industrial Recovery Act, however, the President gave the Wagner Act strong support in the House. It reached his desk and was signed on July 5, 1935.

This bill established an independent agency which resembles the Federal Trade Commission in many respects, although it has three members rather than five and does not require any bi-partisan representation. The Act places upon the Board two principal duties: (1) preventing unfair labor practices, and (2) deciding questions of representation. Unlike the corresponding term "unfair trade practices" in the Federal Trade Commission Act, the term "unfair labor practice" is defined with reasonable preciseness by the statute so that the Board members are given little latitude for making policy in this field. Moreover, the Board's power to prevent unfair labor practices extends only to employers, the Act defining the prohibited practices as follows:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Section 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or adminis-

tration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (48 Stat. 195 (1933), 15 U. S. C. A. Sections 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Section 9 of the Wagner Act dealing with representatives and elections, however, confers broad discretion upon the board. This section declares that representatives designated by the majority of the employees in an appropriate bargaining unit shall be exclusive representatives of the employees and leaves to the Board the duty of deciding whether the appropriate unit for the purposes of collective bargaining "shall be the employee unit, craft unit, plant unit, or sub-division thereof." Another subsection, 9(c), authorizes the Board to investigate questions of representation and directs it to provide for a hearing with a secret ballot or some other suitable method for ascertaining the wishes of the employees.

The procedural sections of the statute are contained in

Sections 10 and 11. The first of these sections gives the Board "power to issue" a complaint whenever it receives a charge of an unfair labor practice and to set the complaint for hearing before the Board or one of its members or designated agent. Under the Board's regulations, the charging party, usually an individual worker or a labor union, must file his accusations in writing in one of the 24 regional offices which the Board has established throughout the country. This written charge is then referred to an investigator, known as a Field Examiner, and if he concludes that there is reasonable grounds for believing the charge is true, he attempts to get the employer to agree to correct his violation of the law, or if he finds that the charges are groundless to get the union to withdraw them.

About 90% of the cases are disposed of in this informal way. If the Regional Office is of the opinion that the issuance of a complaint is not justified, the charging party can appeal from this ruling to the Board. This appeal is of an *ex parte* character since the only papers sent to Washington are the investigator's report, any statements he has taken from the persons concerned, and the comments of the Regional Director and Regional Attorney. If the Board disagrees with the Regional Director it will then instruct him to issue a complaint.

The issuance and service of complaint brings the case into what is called the formal stage. With the service of the complaint a time and place is set for a hearing and a lawyer from Washington, known as a trial examiner, is assigned to conduct the hearing. In recent years, the practice of having the Board or any individual member preside at the hearing in the first instance has virtually been abandoned. It should be noted that the trial examiner is not a member of the regional staff which has responsibility for prosecuting the complaint, nor is he a subordinate of the General Counsel, the officer to whom the regional attorneys are responsible. His immediate supe-

rior is the Chief Trial Examiner, who reports directly to the Board.

Under the statute, the rules of evidence prevailing in courts of law or equity are not controlling at these hearings. There is opportunity for cross-examination, however, and the better practice among trial examiners is to be sparing on the admission of hearsay.

At the conclusion of the hearing, the trial examiner affords the parties, that is, the Regional Attorney and counsel for the employer, and the union or unions involved, an opportunity for a closing summation of the record and a chance to file papers, as the stenographic transcript of the record is made available to all the parties.

The trial examiner then returns to Washington and writes an intermediate report containing his findings of fact, conclusions of law and a recommended order. Although the report bears the trial examiner's name, it is written in consultation with the Chief Trial Examiner and his supervisory staff. After the intermediate report issues the parties, including the Regional Attorney, have an opportunity to file written exceptions and to ask for oral argument before the Board in Washington. The Board rarely grants oral argument to the Regional Attorney but in complaint cases such an opportunity is given to employers and unions as a matter of right. Parties may also submit briefs.

At the conclusion of the oral argument the briefs, bills of exceptions and the transcript are assigned for study to another branch of the General Counsel's office—the Review Division. One of the Review Attorneys then prepares a memorandum containing an abstract of the record and an analysis of the principal exceptions which have been raised. These memoranda are circulated to members of the Board who meet in executive session three times a week. At these sessions, usually attended by the trial examiners and their supervisors, as well as the Review Attorneys and their supervisors, the members vote on the

issues, following which a member of the Review Division, usually the man who has written the abstract, is assigned to prepare a draft opinion for the majority.

Decisions and orders of the Board are not self-enforcing. Whenever a cease and desist order is issued against an employer or an order requiring him to take such affirmative action as reinstating improperly discharged employees with back pay, an effort is made by the regional office to secure voluntary compliance with the order. If these efforts are unavailing, the case is then referred to the General Counsel's office for the drawing of a petition for enforcement under the provisions of Section 10 of the Wagner Act. Generally speaking, these petitions are filed in the Circuit Court of Appeals where the complaint originated. An employer may file a petition for review himself, however, without waiting for an enforcement petition if he sees fit. He has his choice of venue, for he can seek review in the Court of Appeals for the District of Columbia as well as in the Circuit Court of Appeals for the area in which he resides or does business. With regard to judicial review, Section 10 provides that the findings of the Board as to the facts shall be conclusive "if supported by evidence."

Since so many contested complaint cases reach the Board each year for decision—the Board now having published more than 70 volumes of decisions—the amount of litigation in the circuit courts runs in the neighborhood of 100 cases a year. The Supreme Court usually grants from six to ten writs of certiorari to the Circuit Courts in cases in which the Labor Board is a party. Under the Act all this litigation is handled by the Board's own attorneys, although if a case reaches the Supreme Court, the Solicitor General's office generally goes over the brief, and if the case is an important one, the Solicitor General himself may argue it.

The subject to which I shall now address myself is the extent to which the new regulations of the Board relating

to complaint cases conform to the basic standards which the Federal Administrative Procedure Act was intended to insure. My task has been made somewhat easy by an illuminating article in the current issue of the American Bar Association Journal by Dr. David Findling, one of the most scholarly members of the legal staff of the Board.

Shortly after the passage of the Administrative Procedure Act the Board assigned a committee of the General Counsel's office to re-cast its regulations and rules of practice to conform with the Act. The amended rules and regulations, which are comprehensive, were published in the Federal Register on September 11, 1945, and reveal a serious and honest attempt to comply with Section 3 of the Administrative Procedure Act. Shortly after their publication, Mr. Gerhard VanArkel, the General Counsel of the Board, convened a conference of attorneys representing labor organizations and employers with a view to discussing and explaining the revised rules and procedures. As it was already the practice of the Board to publish its final opinions and orders, Section 3(b) of the Administrative Procedure Act did not require any innovation in Board practice, nor did Section 3(c), which relates to making matters of official record available to the parties since the Board has always permitted its formal files, containing the pleadings, motions, transcript of testimony, exhibits, and orders to be available for inspection.

Since complaint cases involve the process of adjudication rather than rule-making, in the sense in which the Administrative Procedure Act uses those terms, I come now to the impact of Sections 5, 6, 7 and 8 upon Labor Board procedure where unfair labor practices are involved. The Board has concluded that the general method in which complaint cases are tried and adjudicated conforms in general with what are now contained in these sections of the act as requirements. In other words, the rules of practice even prior to revision contemplated particularized complaints, responsive pleadings, a full quasi-judicial hear-

ing before a trial examiner, an intermediate report of the examiner, opportunity for exceptions, briefs and oral argument before the Board.

With respect to Subsection 5(b) relating to informal adjustments, the Board has made no change in the practice of permitting settlements to be made by field personnel without requiring an admission of guilt on the part of employers affected.

Section 5(c) relates to separation of functions as between hearing officers, and officers and employees who engage in prosecuting or investigative functions. The Board concluded that this subsection was satisfied under the organizational structure, which I have described, which makes the trial examining division a separate autonomous unit. The second sentence of Section 5(c) to the effect that hearing and decisional officers may not engage in *ex parte* consultation on facts at issue has been construed by the Board as merely prohibiting such officers from consulting persons *ex parte* in order to obtain factual evidence, but not as precluding them from conferences or consultations with assistants and colleagues not identified with the investigation or prosecution of the case.

While this is not an unreasonable construction, I have always felt myself that the internal practice of the Board which requires a trial examiner to submit his report in draft form to the supervisory staff of the trial examining unit, is not a sound one. It injects the influence of other employees, no matter how well intentioned, who have not had the opportunity of seeing the witnesses or appraising their credibility. Moreover, it creates the possibility of bringing the attention of the trial examiner to certain legal arguments to which the parties may not have adverted. Since the trial examiner is held out by the Board as having final responsibility for everything which is in his report, including the findings of fact and conclusions of law, the best administrative practice would seem to suggest that the trial examiner prepare and issue his report

without consultation unless the parties affected by these consultations are given an opportunity to present their views.

So far as forms of decision under Section 8 of the Administrative Procedure Act are concerned, the agencies are permitted the option of either letting the trial examiners make a recommended decision or authorizing the trial examiner to make the initial decision, which, without further agency action, becomes final and subject to judicial review in the absence of appeal to the agency by any party or review by the agency on motion.

The Board has always followed the first of these two alternatives and will continue to do so under the Act. On occasions the Board has dispensed with intermediate reports of the trial examiner and itself has issued a proposed decision and set it down for oral argument with an opportunity to file exceptions and briefs.

Under Section 5(c) of the Act which directs that the trial examiner who hears the case shall make either a recommended or initial decision, except where he becomes unavailable, the Board has decided that the Act requires the abandonment of this practice unless the trial examiner has been removed by death, illness or resignation.

There have been some changes in the rules and regulations, and the more important ones may be summarized as follows:

Section 203.15 has been changed so as to provide, in conformity with Section 6(d) of the new Act, that the Regional Director advises the parties in writing of the procedural or other grounds when he dismisses a charge and declines to issue a complaint.

Section 203.16 has been amended so as to provide that respondents shall file an answer to the complaint and that upon their failure to file an answer all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board. Heretofore, the Rule provided that the respondent had the right to file an answer

but there was no provision as to what happened if he did not. The Rule was quite clear that if a respondent filed an answer which contained certain denials but did not deny other allegations, the allegations not denied were deemed to be admitted. Accordingly, a party was better off under the old Rules if he filed no answer to the Board's complaint than if he filed an answer.

Section 203.35 has been amended to permit parties to file proposed findings before trial examiners as well as to submit briefs and make oral argument before trial examiners, and proposed findings were also accepted; but there was no explicit provision in the Rules permitting the filing of the proposed findings.

A more controversial question with respect to orders in complaint cases is the problem of whether or not the Administrative Procedure Act has enlarged the scope of judicial review.

As I have said, the Wagner Act in providing for judicial review of final orders of the Board provides that the facts found by the Board shall be conclusive "if supported by evidence." The Supreme Court has construed this language in Section 10 of the Wagner Act to mean substantial evidence. Section 10(e) of the Administrative Procedure Act requires the Court to set aside findings and conclusions found to be "unsupported by substantial evidence." In *Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197, 59 Sup. Ct. 206, 83 L. ed. 126 (1938), the Chief Justice stated that:

substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

This rule was further clarified in another Supreme Court decision dealing with the *Waterman Steamship Company*. There the Circuit Court of Appeals for the Fifth Circuit had reversed a finding of an unfair labor practice as the records showed that the witnesses produced

by the defense contradicted the less numerous witnesses produced by the complainant. The Supreme Court in reversing the Circuit Court of Appeals and affirming the Board's order concluded that even though the Board order was not supported by the weight of the evidence, it was enough if there were substantial evidence in the record. The Board itself concluded in the light of these decisions that Section 10(e) has not altered existing law with respect to judicial review of findings of fact. While the wording in the statute would seem to support this conclusion, some doubt has been thrown upon it by a colloquy on the floor of the Senate when the bill was being debated:

MR. GEORGE: Would the enactment of this bill require some substantial or probative evidence to support such a finding?

MR. MCCARRAN: Yes.

MR. GEORGE: Take the labor relations cases. Senators are familiar with them. The Circuit Courts have frequently complained against what the Labor Relations Board did, but have said, 'We are powerless to interfere with it.' Would this bill change that rule, if the court were of the opinion that there was no probative evidence?

MR. MCCARRAN: Yes, it would change that rule.

MR. GEORGE: I am pleased to hear it.

Another question presented by Section 10(e) is whether or not the language requiring the reviewing court to "decide all relevant questions of law" has not overruled the doctrine of *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 64 Sup. Ct. 851, 88 L. ed. 1170 (1944), where it was held that an interpretation of law by an expert body is entitled to some conclusiveness upon review.

A much more ambiguous section of the Administrative Procedure Act has raised two questions which the Board has had to consider. I refer to Section 10(a) which confers a right of judicial review except where "(1) statutes pre-

cluded judicial review, or (2) agency action is by law committed to agency discretion."

It has been held, for example, that there can be no judicial review of a certification of employee representatives for collective bargaining purposes under Section 9 of the Wagner Act. See *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 60 Sup. Ct. 300, 84 L. ed. 347, (1940). It would seem that this construction of the Wagner Act is proper in situations in which an employer seeks to obtain a review of certification, as he can attack a certification collaterally. Section 9(d) of the Wagner Act itself contemplates that the transcript of the hearing in a representation case shall be incorporated with a complaint case arising under subsection 8(5) for refusing to bargain with a certified union. But a union aggrieved by a unit decision of the Board under this doctrine has no opportunity today for judicial review under the Wagner Act. The legislative history of Section 10(a) of the Administrative Procedure Act would seem to indicate that the new statute has not changed the law in this respect since Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946), accompanying the bill included in the memorandum in which the Attorney General referred to the *American Federation of Labor* case as to a similar holding under the *Railway Labor Act* in the *Switchmen's Union* case, 320 U. S. 297, 64 Sup. Ct. 95, 88 L. ed. 61 (1943). Nor does it appear that the Administrative Procedure Act has given a disappointed litigant a right to ask the courts to review the *ex parte* action of the National Labor Relations Board in refusing to issue a complaint. Under existing law this cannot be done as the courts have construed the phrase "shall have power to issue a complaint" as meaning that this falls within a field of discretion committed by law to the Board.

Another controversial question which confronted the Board in preparing its regulations was whether or not the provisions of Section 4 of the Administrative Procedure Act relating to rule-making apply to its procedures. This

problem is one particularly relevant to the representation procedure of the Board. Under current practice, if a group of employees or a labor organization petition for an investigation and certification of collective bargaining representatives, the regional office investigates the petition, and if it appears to have the support of a substantial number of employees in the proposed bargaining unit, the matter is set down for a hearing. The transcript of this hearing is then sent to Washington where the Board issues a decision either dismissing the case or determining the appropriate bargaining unit and directing an election in such unit. If the latter course is pursued, the regional office then conducts the election.

Section 5 of the Administrative Procedure Act relating to adjudications specifically exempts "the certification of employee representatives", and the Board has therefore properly concluded that the requirements of separation of functions and the other formalities which the Act enumerates for adjudications are not applicable to representation cases. Consequently, although the practice has been to use trial examiners as well as regional personnel to conduct these hearings, these persons will be designated in the future as "hearing officers", thus taking them out of the requirements of Section 11.

There is a real question, however, as to whether the Board is correct in concluding that Section 4 of the Administrative Procedure Act entitled "Rule-Making" does not apply to representation cases, or at least to some of the present rules and regulations relating to them. The Board's premise is that the requirements of Section 4 which give outside parties a right to participate and be heard with respect to the making of a rule and to present a petition for the issuance, amendment or change in a rule, apply only to substantive rules, since the Act exempts interpretative rules, general statements of policy, rules of agency organization, procedure or practice.

While this premise is sound, it appears, however, that

some of the regulations with respect to representation cases are truly substantive in character. One of these is the regulation relating to run-offs where two or more unions are on the ballot in the original election and the results are inconclusive. At one time the Board itself held a hearing to determine whether or not there would be a run-off and prescribed the choices to be placed on the run-off ballot. Since 1943, however, an amendment to the regulations has made it mandatory for a regional office to conduct a run-off where the results are inconclusive. As this regulation reads, however, it does not place employees who cast their votes against any union on a parity with employees voting for a union, since the choice of "neither" or "none" is omitted from the run-off ballot unless a plurality for such a choice was tabulated on the first ballot. Similarly, the rule which limits employer petitions to situations in which two or more unions are claiming representation seems also to be substantive in character, as the courts have recognized a presumption of continuing majority arising out of a certification. In fact, during the war the War Labor Board, by what was probably an extra-legal interpretation of its powers, did compel employers to make contracts with unions which had lost majorities if the union had ever been certified by the Board.

I think what I have said indicates that on the whole procedures before the National Labor Relations Board do conform to the general standards prescribed by the Administrative Procedure Act. As compared to many agencies of the government, which fail to separate the functions of investigator and judge or to afford applicants copies of their precedents, the Board is a model of administrative virtue.

The most questionable practice in which the Board indulges does not appear to be covered by the Administrative Procedure Act. I refer to the practice of having trial examiners whose reports have been drawn into question at public oral arguments on bills of exceptions to be

present in executive sessions of the Board when the Board is in the process of making its decisions. It seems to me that this is repugnant to the principles enunciated by the Supreme Court in the Morgan case that "He who decides must hear", as is the practice of delegating so much adjudicated responsibility to the Review Division. While there is nothing in the Act which touches upon either one of these practices, it would seem to me that the Board would promote the essential spirit of the new legislation by eliminating them.

For reasons which have nothing to do with the text of the Administrative Procedure Act, but are intimately bound up with the explosive character of industrial relations, I have long been an advocate—both in and out of the Government—for an organic as well as a practical separation of the Board's judicial and practicing functions. To my mind it would build up much greater public confidence in the fairness and impartiality of the Board if it were a purely judicial body and its field offices and enforcement staff transferred to a separate division established in the Labor Department.

Under the Board's current regulations, the prosecuting and investigating functions have been largely delegated to the regional offices, but the Board is still charged, by statute at least, with the duty of issuing its own complaints. Moreover, a great deal of time of the Board members is consumed in the tasks of personnel and fiscal administration incident to the operation of the field offices. By relieving the Board members of these incidental duties, they would have more time to concentrate upon the actual hearing of cases or reviewing findings and recommendations of trial examiners. Proposals of this sort are now pending in Congress, and the hearings on them should develop an interesting chapter in the administrative process.

DISCUSSION PERIOD

FEBRUARY 7, 1947

The Session Convened at 8:00 p.m.

QUESTION: I would like to ask Mr. Reilly whether he understands the definition of "rule" in Section 2(c) of the Act. As I read the definition of "rule," it would quite clearly include the designation of an appropriate bargaining unit if it were not for the fact that the first paragraph of Section 5 dealing with adjudication excludes the certification of employee representatives. This question is not directed so much to the National Labor Relations Board as it is to what appears to me to be the complete unintelligibility of Section 2(c).

Mr. Reilly mentioned that before, but it seems to me that when you say, "the whole or any part of any agency statement of general or particular applicability and future effect," when you have said, "general or particular," you say everything. Therefore, the only thing left is future effect. Implementing the statute, certainly a determination of an appropriate bargaining unit is purely a future effect, so that that is defined. I find it very difficult to think of anything which is not comprehended within the definition of "rule."

MR. REILLY: It is very loosely drawn. I am rather inclined to think, though, that what is meant by "future effect"—I agree with you that the word "particular" would literally mean any decision of a unit question—relates more to the kind of rule that I mentioned on run-offs. There you know what you are going to be up against in a case, but yet cannot draw that particular principle to the attention of the deciding officer or the deciding board in the case with a view to having it overruled, as would be the case if it were a mere precedent against you.

It is quite true that the Board almost as a rule of thumb, in representation cases, e.g., if there is an unexpired

contract, will dismiss the petition even though the evidence makes it clear that there has been a revulsion of feeling on the part of the men in the unit and they want to get out and get into another union. But, there is nothing to prevent any of the counsel in that case from asking that this previous line of decisions be overruled and pointing out any flaws in the prior reasoning of the Board. Therefore, this leads me to think that the Board has been correct in its construction of the statute in that respect.

QUESTION: Would the failure of the Board to issue a complaint be subject to judicial review?

MR. REILLY: I should rather think it would be, if it were not for the fact that Section 10 of the Administrative Procedure Act precludes review of action, which by law, is "committed to agency discretion," for the Wagner Act uses the term, "have the power to issue," rather than some language like "shall issue a complaint upon a certain finding of fact." Consequently the conclusion has been reached that such failure or refusal is unreviewable and that conclusion is supported by the fact that a Circuit Court of Appeals decision so construing the Wagner Act, *Jacobson v. NLRB*, 120 F. (2d) 96, is mentioned in the Attorney General's memorandum which accompanied the Senate report.

QUESTION: With reference to the question of judicial review, not particularly relating to the National Labor Relations Board alone, would you venture to correlate Section 7(c) which provides "No sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence." That seems slightly different from the scope of review provided in 10(e). Is there any line of demarcation between those two? Do they cover different subjects?

MR. REILLY: It always seemed to me a little incongruous to have one standard for judicial review and another standard specifically inserted for the agency. Presumably, all agencies, in the first instance, are supposed to decide a question according to the preponderance of the evidence, or the weight of the evidence. In other words, it is not enough for the agency, in the first instance, to make findings supported by reliable and even substantial and probative evidence. It has the duty of weighing all the evidence and reaching the right conclusion.

But, it seems to me to insert in a statute one standard for the Board that decides the case in the first instance, and then a different standard for the reviewing court, leads to a very paradoxical result. Can it not be argued that the reviewing court has a duty to decide that the Board, in the first instance, decided the case in accordance with the reliable, probative, and substantial evidence? And yet, the court's power of review is apparently limited by the language in 10(e).

QUESTION: Do you not think what the courts will say about that is that Section 7(c) is an exhortation to the agencies, but the only way the courts can determine whether or not the agency has lived up to the exhortation is to examine under 10(e) whether the decision is rational? And that is the substantial evidence rule. Once they find it is rational, they cannot say that the agency did not follow the exhortation in 7(c).

MR. REILLY: That would be my conclusion. But I think even though the Administrative Procedure Act had used stronger language and said that the agency should decide according to the weight of the evidence, that would not alter the limited scope of judicial review as defined in Section 10(e).

QUESTION: I might mention, also, if you do not know it, that part of that language in 7(c), I think the word "supported," and I know that very strong, little word "the"

which changes the whole sense of the sentence in 7(c), came into the Act in the House, and when the Act came back to the Senate and Senator McCarran was detailing the changes made in the House bill, before he got to 7(c), somebody got up and said: "May I ask the Senator whether all the changes made in the House are simply matters of form and not matters of substance?"

And Senator McCarran said: "That is correct."

So if 7(c) does make a serious change in 10(e), it is perfectly clear from the legislative history that the Senate which voted for it was entirely unaware of what it was voting for.

QUESTION: May I supplement what has been said about that?

MR. REILLY: Yes, indeed.

QUESTION: It has been our view that, in addition to the comment Mr. Reilly has made, that the requirement of Section 7(c) is itself (and this is in line more or less with Mr. Benjamin's comment, I think), intended to be a restatement of the substantial evidence rule, so that you do not have that paradoxical situation which Mr. Reilly has referred to of one rule for the agency and another for judicial review.

The reason for our view that the 7(c) requirement is itself nothing more than a restatement of the substantial evidence rule requirement is this; as has been said: In the last stages of the legislation, and this was even after the bill had passed the Senate, it was going to the House, Section 7(c) did not read as it does now, but it referred to relevant, reliable, and probative evidence. And you will note the word "substantial" was not in it. The word "substantial" is there now, but it was not in 7(c) originally, even after it was passed by the Senate. I think the history is very clear that the Senate Judiciary Committee thought that in using the phrase "Relevant, reliable, and probative evidence," it was merely stating the substantial evidence rule.

That appears from the Senate Committee Print of June, 1945, in which the very question we are talking about now was referred to by the Committee.

The Senate Judiciary Committee said: "The reliable, probative, and relevant standard was that recommended by the majority of the Attorney General's Committee," and that the courts had used the same standard in determining whether or not agency action was supported by substantial evidence. Then it went on to cite four National Labor Relations Board cases in which the court had construed the substantial evidence rule, including the Consolidated Edison decision to which Mr. Reilly has referred.

The Committee also said that agencies had argued that the relevant, reliable, and probative evidence phrase in 7(c) "varied the present and tested rule for administrative action." But the Committee said that that argument was erroneous; that no change was intended. Now, it is true that when the bill got over to the House later, the phraseology was changed. The House amended 7(c) to read as it does now. That is, to recite that the standard was "reliable, probative, and substantial evidence."

Without that background, one would reasonably suppose that the addition of two words to "substantial" would indicate that something more than "substantial" was intended. But in the House Judiciary Committee Report, the Committee says that the change was made because some hypercritical mind might otherwise think that the omission of the word "substantial" was intentional. The Committee says: "Obviously"—and I am quoting—"the agency will proceed in accordance with the evidence which it finds reliable, probative, and substantial. There is no reason why the bill should not say so."

As Mr. Benjamin said, when the bill got over to the Senate, Senator McCarran stated on the floor that the changes made in the House were not intended to make any changes in substance. It is for that reason, we think, that

the change of phraseology has no significance, and that 7(c) really is intended to be a more elaborate definition of the substantial evidence rule as it has been promulgated by the courts.

QUESTION: Might I just say a word about that? I think someone tried to pull a fast one in the House on this. While I agree with what Mr. Findling says it ought to be, I do not think you can be quite as cavalier as that about the words "supported by and in accordance with," or about sticking that word "the" in.

I sat in with the A. P. A. Committee in an earlier informal stage when somebody came along with that word "the" with perfectly clear intent. The evidence, the substantial evidence, can only be on one side, and that means a choice. Somebody stuck that word in there hoping that it meant more than I hope it means and more than Mr. Findling hopes it means. Therefore, I think it is very important that when this case comes up first before the court, that that problem should not be ignored.

QUESTION: As a matter of fact, it has been raised. I think the very first case I know of in which it has been raised involving the Labor Board is the Thompson Products case, Mr. Reilly, in the 6th Circuit.

MR. REILLY: That was raised in the argument, was it?

QUESTION: Yes. The case was argued Thursday, and I do not know what happened at the argument, but it was raised in the company's brief. I think perhaps the Court will duck it because I doubt whether the Administrative Procedure Act requirements apply to that case since the case was instituted prior to the effective date of any provision. But assuming the Court disagrees with us, they may have to decide the question as to whether or not the substantial evidence rule has been changed.

QUESTION: Mr. Reilly, on the subject of judicial review. Do you understand now that under this Administrative Procedure Act version, proceedings of an appropriate unit

is still not reviewable even though the aggrieved party might be the plurality party in a certification procedure which the Board has ordered, according to the Supreme Court opinion in the West Coast Shipworkers' case? Certain port locals of the A. F. of L. requested a certain unit and the Board, in its discretion, said, "No, we certify a different unit and the plurality has no right to review." Is that correct?

MR. REILLY: Yes, that is correct, because of the Supreme Court case which construed the Wagner Act to that effect. The Senate Report indicates that this case is not being overruled; that would still be good law.

QUESTION: How do you feel about that as labor relations practice outside of this law?

MR. REILLY: Well, I have always felt that the problem of review of certifications is a very difficult one. I have no objection to the rule which requires an employer to await a final order to bargain before he can seek judicial review, but I do think that it is pretty harsh both upon individual employees and upon a union which feels aggrieved by having the unit determination go against it, not to be able to take those cases to the court even though the statute has such vague standards that it is rather unlikely they could overthrow the Board order even though they did get judicial review.

Although certifications are not final orders, they have a tremendous impact upon the rights of employees. It should be noted that once a union becomes certified, if there is any collusion between the company and that union, all those employees that may feel aggrieved by its certification can be covered in by a closed shop contract, so that under certain circumstances their right to a livelihood really depends upon their being able to obtain a reversal of that administrative decision.

I might say S. 360, one of the Ball bills, deals with the problem although I am not sure in a completely satisfac-

tory way. It provides that there can be judicial review of a certification if a petition is filed within ten days after the certificate issues, but that the petition for review will not operate to stay a labor board complaint under Subsection 8(s), unless the court specifically orders that it be stayed.

Those words were apparently put in to prevent resort to judicial review purely for dilatory purposes. One of the big difficulties with judicial review of certifications is that under current practice, unless a certification results in a contract, it is not considered to have any valid effect after a year, and it is very rare that any Circuit Court of Appeals will decide a case in much less than that time.

QUESTION: I think, Mr. Reilly, that you expressed some dissatisfaction with the present practice of the Board with respect to assistance rendered to trial examiners by review attorneys in helping trial examiners prepare their reports on the ground that credibility of the witness was something that these trial and review attorneys could not evaluate. Do these attorneys evaluate credibility questions?

MR. REILLY: It is not the role of the review attorney in the process that I feel is questionable. He does not get into the picture until the trial examiner's report is filed, served on the parties, and the case comes up to the Board on a bill of exceptions. Then he analyzes the brief and comments upon the trial examiner's report in the light of that. Of course, he is not in a good position to appraise the witnesses, but neither is the Board.

It is not that to which I adverted. It is the practice of the trial examiner, before his official report issues, of showing his proposed findings in draft form to the supervisory trial examining staff. The supervisors, also, have some assistants for review, if they want to call on them, but it is the discussion and consultation with the supervisory staff which I think is objectionable, especially as the supervisors do not take responsibility for the report and the report issues under the trial examiner's name.

RULE MAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT

DAVID REICH

I have been requested to speak to you about rule-making under the Administrative Procedure Act. This is a subject that very definitely appeals to me, because I played a part in the drafting of the rule-making provisions of the Act. Other speakers, I believe, have indicated the scope of the interest of the Department of Justice in the formulation and administration of the Act. It is perhaps sufficient for me to add, at this point, that from the very beginning the Department has had a vital interest in the framing of legislation on this subject and, as Attorney General Tom C. Clark said in his letter of October 19, 1945, to the Chairmen of the House and Senate Judiciary Committees, the Department has long been of the view that legislation in this field was not only possible but desirable from the standpoint of both the public and the Government itself. I regard it as a privilege to have been associated with the draftsmen of the Act and to have participated in the very real contribution which I think, it will be generally agreed, the Department of Justice and Attorney General Clark have made to the whole program. At the same time I want to stress that I am here in my individual capacity, and that what I have to say should not in any sense be considered an official interpretation of the Act by the Department of Justice.

To a person not familiar with the Act, rule-making would have its usual connotation. It would mean the activity of an agency of the Government in prescribing a rule or regulation affecting a class of persons. Such are the usual rules issued by the agencies of the Government. For example, the Federal Reserve Board issues regulations governing margins in stock market transactions. Persons

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trading in securities must abide by these regulations. Similarly, the Secretary of Agriculture issues standards of quality and condition of grain under the Grain Standards Act. These standards must be followed by persons selling grain by grade in interstate or foreign commerce. These are truly rules of general applicability which govern all persons similarly situated.

But the Administrative Procedure Act is not confined to such rules.¹ It also covers rules which may apply only to named individuals or specific situations. These rules encompass, among others, such situations as the fixing of rates,² prices, corporate reorganizations and corporate mergers. Thus, the prescription by the Interstate Commerce Commission of specific rates for a particular railroad is rule-making within the meaning of the Administrative Procedure Act. So, too, is the action of the Securities and Exchange Commission in approving reorganizations of holding companies registered under the Public Utility Holding Company Act.

¹ This is amply illustrated by the legislative history of the definition of rule. In the first draft of S. 7 (the Administrative Procedure Act as introduced in the Senate), the term rule was defined to be "any agency statement of general applicability designated to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency." Sen. Comparative Committee Print of June, 1945 at 3. When S. 7 was passed by the Senate, the definition of rule remained the same but a significant change was made. The term rule making was broadened to include "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor, or of valuations, costs, or accounting, or practices bearing upon any of the foregoing." The definition of rule itself was broadened in H. R. 1203, 79th Cong., 2d Sess., 1945 (the Administrative Procedure Act in the House) so as to include statements of general or particular applicability and future effect. H. Rep. No. 1980, 79th Cong., 2d Sess. (1945) p. 49. The explanation of the addition of the words "or particular" to the definition of rule was as follows: "The change of the language to embrace specifically rules of 'particular' as well as 'general' applicability is necessary in order to avoid controversy and assure coverage of rule making addressed to named persons." See Note 1, *supra*.

² *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226, 29 Sup. Ct. 67, 53 L. ed. 150 (1908); *Louisville & Nashville R. R. v. Garrett*, 231 U. S. 298, 305, 34 Sup. Ct. 48, 58 L. ed. 229 (1913). "We must conclude that the making of rates, whether by the legislature or by a commission, is a legislative function" Cheadle, "The Delegation of Legislative Functions" (1938)

4 Selected Essays on Constitutional Law 250 at 274.

The broad coverage of rule making under the Administrative Procedure Act is shown clearly by its definition in Subsection 2(c). The definition is as follows:

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule-making" means agency process for the formulation, amendment, or repeal of a rule.

While this is not the classical definition³ of rule-making, it is a functional definition⁴ adopted for the purpose of classifying together all types of administrative action which are legislative in nature.⁵ The full importance of the definition is realized only by reference to the operative provisions of the Act which treat rule-making differently from adjudication. In this connection, I should like to advert to the fact that the definition of rule-making is determinative, in a sense, of the meaning of adjudication under the Act, since adjudication is defined in terms of rule-

³ Professor Fuchs, in an article entitled "Procedure in Administrative Rule-Making" (1938) 52 Harv. L. Rev. 259, states at 263:

"The most obvious definition of rule making and the one most often employed in the literature of administrative law asserts simply that it is the function of laying down general regulations as distinguished from orders that apply to named persons or to specific situations."

⁴ In a recent article in the Illinois Law Review, Professor Nathanson, after analyzing the definitions in § 2 of the Administrative Procedure Act, makes this observation:

"One need not study these definitions long before coming to the conclusion that they must find their justification in extremely pragmatic, not philosophical considerations. This is as it should be; they are tools, not ends in themselves." "Some Comments on the Administrative Procedure Act" (1946) 41 Ill. L. Rev. 368 at 372.

⁵ "Proceedings are classed as rule making under this act not merely because, like the legislative process, they result in regulations of general applicability but also because they involve subject matter demanding judgments based on technical knowledge and experience." Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945) at 39.

making. Subsection 2(d) defines adjudication to be any agency process other than rule-making but including licensing. Theoretically, therefore, it is necessary to determine initially whether a proceeding is rule-making and if it is not, then whether it may be adjudication. As a practical matter, however, it will be found that proceedings which have been considered traditionally by both administrative agencies and the courts as adjudication will continue to be deemed such.

The definition of rule-making, you will note, includes every type of rule, not only substantive rules but also organizational, procedural, and practice rules. However, the impact of the Act is different for substantive rules than it is for organizational, procedural, or practice rules. The latter, for example, are not subject to the procedural requirements of rule-making under Section 4, except where notice or hearing is specified for them by statute independent of the Administrative Procedure Act.

The first operative provision of the Act insofar as rule-making is concerned is the public information requirement of Section 3. Prior to the passage of the Administrative Procedure Act, the only substantial requirement as to the publication of information about agencies of the Government was found in the Federal Register Act.⁶ That Act, adopted in 1935, required, among other things, that there be published in the Federal Register such "documents or classes of documents as the President shall determine from time to time have general applicability and legal effect." This class of documents consists of the substantive rules and regulations issued by the various agencies of the Government.

In 1941, after two years of study of the operations of the more important Federal regulatory agencies, the Attorney General's Committee on Administrative Procedure came to the conclusion that sufficient information was not given to the public about the organization, procedures,

⁶ 49 Stat. 501 (1935), 44 U. S. C. A. § 305(a) (2).

and rules of practice of the agencies of the Government.⁷ The Committee recommended that specific legislation be enacted to require agencies to publish not only their substantive rules but also information about their organization and procedures. Section 3 of the Administrative Procedure Act seems to be the answer to this recommendation. This section continues the requirement of the Federal Register Act as to the publication of substantive rules and, in addition, requires agencies to publish in the form of rules their organization and procedures. Specifically, each agency must publish in the Federal Register (1) organizational rules containing a description of the agency's central and field organization, its delegations of final authority and the manner in which the public may secure information, (2) procedural rules relative to the general course and method by which its functions, such as rule making and adjudication, are determined, and (3) substantive rules, as well as agency statements of general policy which have been formulated and adopted by the agency for the guidance of the public (subsection 3(a)).

However, there is an exception to Section 3 for any function of the United States requiring secrecy in the public interest or for any matter relating solely to the internal management of an agency. Thus, it is not expected that the Federal Bureau of Investigation and the Secret Service will have to present statements of the manner in which they conduct their investigations. Nor will it be necessary to publish information about internal administrative matters, such as budget data or internal promotional policies. It was not intended to clutter the Federal Register with much detail with which the public generally has no interest. For this reason, too, "rules addressed to and served upon named persons in accordance with law" need not be published. To include them

⁷ Final Report of Attorney General's Committee on Administrative Procedure (1941) pp. 25-29.

would fill the Register with a great mass of particularized rule-making which is satisfactorily handled otherwise.

The Federal Register of September 11, 1946, was the product of the agencies of the Government in answer to the command of Section 3 of the Administrative Procedure Act. The Federal Register of that date was published in four parts and contains 966 pages. Should you have occasion to refer to the Federal Register of September 11, you should realize that that edition does not contain the complete text of all the substantive rules heretofore issued by governmental agencies. Most such rules have been incorporated therein by reference to the Code of Federal Regulations or to the Cumulative Supplement of the Federal Register or to other editions of the Federal Register in which they have appeared. It would have been a waste of public funds and unnecessary duplication to have republished all substantive rules on September 11, 1946, since they had been published heretofore by reason of the Federal Register Act.

One section of the Act is devoted solely to rule-making, namely, Section 4. The same is true of adjudication which is treated in Section 5. There is one difference, however, in that Section 4 regulates in some manner all types of substantive rule-making, both formal and informal, while Section 5 regulates only formal adjudications. Rule-making and adjudication are deemed formal in the parlance of administrative law where the decision of the agency is rendered as the result of a hearing which is preserved in a written record. The language used by the Act to designate formal rule-making and adjudication is the modifying phrase "required by statute to be made⁸ on the record after opportunity for an agency hearing," appearing in both Sections 4(b) and 5. I shall discuss formal rule-making more fully *infra*.

⁸ In adjudications under § 5, the word "determined" is used in place of "made." Apparently no distinction was intended. H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) p. 51, fn. 9.

The purpose of Section 4 is to guarantee the public an opportunity to participate in the rule-making process. With certain stated exceptions, each agency will be required to give notice in the Federal Register of rules it proposes to adopt and to grant interested persons an opportunity to present their views in some manner to the agency prior to the adoption of the rules.

As in most other situations under the Act, there are exceptions to Section 4. The introduction to the section states that the section does not apply "to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States, or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." It will be seen, therefore, that the rule-making provisions do not apply to the usual functions of the War Department, the Navy Department, or the State Department. Nor do they apply to such lending agencies as the Reconstruction Finance Corporation and the Farm Credit Administration, since these agencies are engaged in matters relating to public loans. Likewise, Section 4 would not be applicable to the rules issued by the Department of the Interior with reference to public parks and the public domain and to property held in trust or as guardian for Indians. H. Rep. No. 1980 (cited in note 8), p. 23. Excepted, too, are rules relating to public contracts issued by the Labor Department under the Davis-Bacon Act (46 Stat. 1494 (1935), 40 U. S. C. A. § 276a, *et seq.*) and the Walsh-Healey Act (49 Stat. 2036 (1942), 41 U. S. C. A. §§ 35-45).⁹

In addition to the exceptions which I have noted above, there must be kept in mind that excepted from all the provisions of the Act, other than the public information requirements of Section 3, are "(1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by

⁹ See *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 60 Sup. Ct. 869, 84 L. ed. 108 (1940).

them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940 (54 Stat. 885, 50 App. U. S. C. A. §§ 124, 301-318, 403); Contract Settlement Act of 1944 (58 Stat. 649, 18 U. S. C. A. § 590a; 41 U. S. C. A. §§ 101 *et seq.*); Surplus Property Act of 1944 (58 Stat. 765, 50 App. U. S. C. A. §§ 1611-1646). (Subsection 2(a)).¹⁰ Thus, such agencies as the War Assets Administration, the Selective Service System, and such constituent agencies of the Office of Temporary Controls as the Office of Price Administration and the Civilian Production Administration may continue to issue regulations without the necessity of complying with Section 4.

There is one further basic exception to the rule-making procedures of Section 4. They are applicable only to substantive rules as distinguished from interpretative rules, general statements of policy, rules of agency organization, procedure or practice.

Pursuant to Section 4, any agency which intends to issue a substantive rule must publish in the Federal Register a general notice which must include a statement of the time, place and nature of the rule-making proceeding, a reference to the authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved. It is not necessary to publish the proposed rule in full. A description of its contents should be sufficient. In many instances it would seem that such a description would be

¹⁰ Subsection 2(a) also in effect contains exceptions to the entire act since it defines agency as any authority of the United States (whether or not within or subject to review by another agency) other than Congress, the courts, the governments of the possessions and Territories, and the District of Columbia. By separate act functions under the Veterans' Emergency Housing Act of 1946 were exempted from all the provisions of the act with the exception of § 3 (60 Stat. 207 (1946), 12 U. S. C. A. §§ 1738-1739, 1743; 50 U. S. C. A. §§ 1821-1833).

preferable to a detailed statement of the proposed rule. A description will serve to focus the attention of interested persons on the substance of the proposed rule.

The required notice, however, may be dispensed with in any situation "in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Congress has recognized thereby that there is no need for giving the public an opportunity to participate in minor amendments to rules and also that emergency situations may arise where an agency must issue a rule forthwith without any public participation. For example, it would be contrary to the public interest to defer the issuance of additional air safety rules where the Civil Aeronautics Board finds that an urgent necessity for them exists.

In situations where notice of rule-making is required, the agency must grant "interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner." The Act leaves to each agency's discretion the choice of method whereby interested persons may participate in the rule-making process. It may take the form of public hearings or of conferences or correspondence or a combination of these or other methods. The selection of the method will depend to a great extent upon the subject matter of the regulations involved. The general objective of the method employed should be to assure, so far as possible, informed administrative action and adequate protection to private interests.¹¹

¹¹ Prior to the adoption of the Administrative Procedure Act many agencies invited interested persons to assist them in the formation of their rules. The Federal Reserve System, for example, consulted regularly with members of the banking world and the Federal Communications Commission before it has issued rules has frequently conferred with the industry which it regulates. See Final Report of the Attorney General's Committee on Administrative Procedure (1941) pp. 103-105.

In adopting its rules, the agency must incorporate in them a concise general statement of their basis and purpose. This statement should prove of assistance to the public in understanding the work of the agency.

These, then, are the requirements for informal rule-making. A much more detailed procedure has been provided for formal rule-making in Sections 7 and 8 of the Act. Before discussing this formal procedure, it would be well to understand what cases of rule-making will be subject to it. As I have said, the descriptive phrase in the Act defining formal rule making is "where rules are required by statute to be made on the record after opportunity for an agency hearing." The words "on the record" appearing in this phrase are very significant. They were inserted for the purpose of distinguishing formal rule-making from informal rule-making. An earlier bill introduced in 1941 did not contain the words "on the record" in describing the types of rule-making subject to formal procedures. The words used in that bill were "where legislation specifically requires the holding of hearings prior to the making of rules, formal rule-making hearings shall be held."¹² There was much objection to this proposal on the part of governmental agencies in that it would subject to formal procedures any case of rule-making where a hearing was required. It was pointed out that Congress has frequently required a hearing in connection with rule-making without intending to subject the agencies to any formal procedures. It was suggested that that legislation be modified so as to make the formal rule-making requirements applicable only to cases of rule-making where Congress has required that the record of the hearing be the basis for the decision of the agency.¹³

¹² This language was contained in § 209(d) of S. 674, 77th Cong., 1st Sess. (1941). The bill was sponsored by the Minority of the Attorney General's Committee on Administrative Procedure as well as by the American Bar Association.

¹³ See testimony of Mr. Ashley Sellers, then of the Department of Agriculture, at Hearings before Senate Judiciary Subcommittee on Administrative Procedure Bills entitled S. 674, S. 675, and S. 918, 77th Cong. 1st Sess. (1941) pp. 78-79.

In order to determine whether an agency must comply with the informal or formal rule-making requirements of this Act, it is necessary to refer to the particular statute conferring rule making power upon the agency. It will be found that most statutes conferring power upon agencies to make rules of general applicability are lacking in any definition of the procedure to be followed in the preparation of regulations. Ordinarily, there is no requirement of notice and hearing or of consultation with outside interests. Typical of such statutes is the Immigration Act of 1917 pursuant to which the Commissioner of Immigration and Naturalization, under the direction of the Attorney General, has power to issue such rules and regulations as "he shall deem best calculated for carrying out the provisions" of that Act.¹⁴ There is no doubt that this type of rule will now be subject to the informal (rather than the formal) rule-making requirements of the Act.

There are other statutes which provide that the agency may issue rules of general applicability only "after hearing" or "after full hearing." For example, pursuant to Section 402(c)¹⁵ of the Federal Seed Act, the Secretary of Agriculture is authorized to issue rules only after a public hearing. There is no express requirement that the rules he issues must be made on the basis of the record developed in the hearing, nor did Congress intend that there be such a requirement. The purpose of the public hearing is to afford interested persons an opportunity to express their views to the agency and at the same time to place the agency in a position of being better apprised of the consequences involved in issuing its regulations. Agencies will continue to pursue informal procedures in making such rules.

There are only a few cases of rule-making of general applicability which are required by statute to be made on the record after opportunity for an agency hearing. There

¹⁴ 39 Stat. 892 (1917), 8 U. S. C. A. § 102.

¹⁵ 53 Stat. 1285 (1939), 7 U. S. C. A. § 1592.

is the Food, Drug and Cosmetic Act under which the Federal Security Administrator must hold a hearing before he may adopt any standards for foods, drugs or cosmetics transmitted in interstate commerce. The statute empowering the Federal Security Administrator to issue such regulations contains a specific requirement that his decision be based on substantial evidence in the record.¹⁶ Similarly, the Fair Labor Standards Act of 1938 requires the Wage and Hour Administrator to hold hearings in the formulation of industrial wage orders and to base his action approving them upon evidence adduced at the hearings.¹⁷ Also, the promulgation of marketing orders under the Agricultural Marketing Agreement Act of 1937 must be based on a record of the testimony taken at a hearing.¹⁸ These rules of general applicability are clearly formal rules subject to the procedures of Sections 7 and 8.

When we consider rule-making involving rules of particular applicability, the requirement of a record is ordinarily present, if not in express terms, at least by implication.¹⁹ For example, rate orders issued by the Federal Power Commission, pursuant to the Natural Gas Act,²⁰ may be made only after hearing. Upon review in a Circuit Court of Appeals or the Court of Appeals for the District of Columbia, the Commission must certify and file with the Court a transcript of the record of evidence adduced at the hearing and the Commission's findings of fact if supported by substantial evidence will be conclusive upon the courts. Definitely subject, too, to the formal require-

¹⁶ 52 Stat. 1055 (1938), 21 U. S. C. A. § 371(e).

¹⁷ 52 Stat. 1064 (1938), 29 U. S. C. A. § 208(d).

¹⁸ 50 Stat. 246 (1937), 7 U. S. C. A. § 608(c).

¹⁹ In explanation of the substitution of the word "statute" for the word "law" in the phrase describing formal rule making, the House Committee on the Judiciary explained the change by stating that "a statute may, in terms, require a rule or order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention so to require, and in either situation §§ 7 and 8 would apply save as other exceptions are operative." H. Rep. No. 1980, 79th Cong., 2d Sess. (1946), at 51, fn. 9.

²⁰ 52 Stat. 821 (1938), 15 U. S. C. A. § 717, *et seq.*

ments of the Act are the Interstate Commerce Commission in prescribing rates for carriers under the Interstate Commerce Act and the Secretary of Agriculture in prescribing rates for stockyards and market agencies under the Packers and Stockyards Act.

We have seen that informal rules are subject to no set procedure. The only requirement is that interested persons be given an opportunity to present their views in some manner to the agency involved. Formal rule-making proceedings, on the other hand, are subject to fairly well defined procedures under Sections 7 and 8²¹ of the Act. These procedures are the same, in general, for both formal rule-making and for formal adjudication.

Any formal hearing that is conducted must be presided over by the agency, one or more members of the body comprising the agency (such as a Commissioner of the Interstate Commerce Commission), special statutory hearing bodies (e.g., joint hearing bodies composed of Federal and State officers under the Natural Gas Act),²² or one or more examiners appointed as provided in the Act (subsection 7(a)). An agency requiring examiners may not select any one of its employees to preside over formal hearings. It must appoint persons designated as examiners and approved as such by the Civil Service Commission.²³ These examiners may perform no duties inconsis-

²¹ Sections 7 and 8 did not become effective until Dec. 11, 1946, six months after the enactment of the Act. While the Administrative Procedure Act was enacted on June 11, 1946, § 12 provided that most of its provisions would not become effective until three months thereafter and that §§ 7 and 8 would not become effective until six months thereafter. The reason that the hearing and decision requirements of §§ 7 and 8 were deferred for six months was to allow agencies sufficient time to adapt their procedures to those required by these Sections. It should be noted that no provision of §§ 7 and 8 is mandatory as to any agency proceeding which was initiated prior to Dec. 11, 1946, so that if a notice as to rule making had been issued by an agency prior to that date, the actual procedure on the proposed rule will not have to conform to §§ 7 and 8, despite the fact that the agency may be holding its hearing after Dec. 11, 1946. See last sentence of § 12.

²² 52 Stat. 830 (1938), 15 U. S. C. A. § 717(p).

²³ Provision is made for examiners in § 11 of the act. The requirement for appointment of examiners is deferred until June 11, 1947. See § 12.

ent with their duties as examiners and they may not be removed by the agency except after a hearing before the Civil Service Commission in compliance with the formal requirements of the Act. Other employees of the Government will not have this protection.²⁴

The Act specifies the obvious in requiring all presiding officers to conduct themselves in an impartial manner. Any officer may withdraw himself from a hearing if he deems himself disqualified. Any party to a proceeding may request that the presiding officer be replaced upon the ground of personal bias or disqualification and if such request is made in good faith and "upon a timely and sufficient affidavit," the agency involved must determine whether the presiding officer should be disqualified. This determination will become a part of the record in the case (subsection 7(a)).

Presiding officers are granted all the authority necessary to conduct proper hearings. They can administer oaths and affirmations, take depositions, hold conferences with the parties, dispose of procedural requests, and take any other action which is authorized by agency rule consistent with the Act (subsection 7(b)). They are authorized to issue subpoenas provided only that the agency with which they are connected has that power. Some agencies, such as the Post Office Department, are not empowered to issue subpoenas.

The Act does not make any change in the rules of evidence applicable to administrative hearings. As heretofore the strict rules of evidence known to courts of law will not be required in administrative hearings. Any oral or documentary evidence may be received but the agencies are required "as a matter of policy" to provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. The rule an agency issues, however, must be

²⁴ Section 5 on adjudication excerpts from the types of adjudication covered by §§ 5, 7, and 8 "(2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to § 11."

based upon a consideration of the record as supported by and in accordance with "the reliable, probative and substantial evidence" (subsection 7(c)).

Where the agency itself has not presided at the reception of the evidence, an intermediate decision must be made by the presiding officer—either an initial or recommended decision according to the wishes of the agency. If the intermediate decision is an initial one, it will become the final decision of the agency in the event that the parties involved take no appeal to the agency or the agency does not seek review on its own motion. Should an agency not desire to have its examiners render initial decisions which may blossom into final decisions, the agency may in a particular case or by general rule require the entire record to be certified to it for initial decision. In such a case the presiding officer must, as a general rule, recommend a decision prior to the agency's rendition of the final decision (subsection 8(a)).

The parties must be granted an opportunity to present proposed findings and conclusions to the presiding officer, and after his decision has been rendered, to submit to the agency exceptions to his decision. The record must show the ruling upon each such finding, conclusion or exception presented (subsection 8(b)).

Should an agency rest its decision on official notice of a material fact not appearing in the evidence in the record, any party on timely request must be afforded an opportunity to show the contrary. Any party, too, upon payment of lawfully prescribed costs may receive a copy of the record of the proceeding (subsection 7(d)).

While the Act treats of the procedure required for formal rule-making and formal adjudication in the same sections—Sections 7 and 8—it recognizes the fundamental distinction between these two types of proceedings by granting at least three exceptions for rule-making to the otherwise set requirements of the Act. These exceptions are predicated upon the recognition that rule-making is quasi-

legislative in nature and not, as adjudication normally is, adversary in character.

The first operative distinction is that in rule-making an agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form (subsection 7(c)). The subject matter of the record in rule-making is composed for the most part of statistical data, reports, analyses, and other documents. Unlike adjudication, the decision is rarely, if ever, dependent upon the oral testimony of witnesses. The demeanor of witnesses, their ability to counter cross-examination and their credibility are not important criteria in the decision in rule-making. An agency engaged in rule-making is not attempting to ascertain whether the past conduct of a particular company requires disciplinary action on the part of the agency. For example, in adjudication under the Trade Commission Act, the Federal Trade Commission must determine whether a particular company has been engaged in an unfair method of competition²⁵ before it may issue a cease and desist order. This may be a highly controverted fact to be decided only after oral evidence has been presented and necessary cross-examination allowed. On the other hand, an agency, such as the Federal Security Agency, in determining standards for foods under the Food, Drug and Cosmetic Act, must consider chemical analyses, statistical reports, and other evaluations, which are based upon written evidence rather than oral testimony. It has been found that cross-examination of the maker of a technical report may serve little purpose other than to consume time.

A second operative distinction is that agencies engaged in rule-making may dispense not only with the initial decision of the presiding examiner but also with his recommended decision. A rule issued by an agency may affect the economic conditions of an entire industry. To such a decision all the expert knowledge of the agency must be

²⁵ 38 Stat. 719 (1914), 15 U. S. C. A. § 45.

brought into play. A presiding examiner ordinarily is not in a position to make decisions on complicated economic problems. For example, a trial examiner could not be expected to contribute very much to the resolution of the complex questions of financial judgment and policy which arise under the Holding Company Act. Every case under that Act represents a segment of a nationwide problem which must be determined on the basis of a uniform congressional policy. The examiner, no matter what his personal qualifications may be, generally has no opportunity to see more than dismembered segments of the overall picture.

Moreover, as I have shown, problems in rule-making seldom turn substantially upon the credibility of witnesses. For this reason also, an agency, even when it has not presided at the reception of the evidence, may dispense with the decision of the presiding examiner and in place thereof issue a tentative decision or have one of its responsible officers recommend a decision. Thus, an informed technician, who is a responsible officer of the agency and whose immediate concern is the particular rule proposed, may render a recommended decision which is of more assistance to both the private parties and the agency than one rendered by the presiding examiner. His decision will usually focus the ultimate issues more sharply in a shorter period of time.

The Act further recognizes that situations may arise in cases of rule-making where the agency, even though it has not presided at the reception of the evidence, should be authorized to dispense with the intermediate decision altogether. It is provided that the intermediate procedure may be omitted "in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires"²⁶ (subsection 8(a)).

²⁶ The insertion of this clause in the act would seem to owe its origin to a complaint expressed by Commissioner Aitchison of the Interstate Commerce

The third difference is that the requirement of separation of functions between the prosecuting staff of the agency and the hearing staff is not applicable to rule-making. The first draft of S. 7 contained a provision that presiding officers at both formal rule-making and formal adjudications could not consult with any person or party unless upon notice to all the parties concerned. Senate Comparative Committee Print of June 1945, p. 13. This provision was deleted insofar as rule-making is concerned and is retained in modified form only with reference to certain types of formal adjudications. See subsection 5(c). And so, in rule-making the hearing examiner may consult with any member of the agency on any of the facts involved in the case. This is a recognition that in rule-making the process of decision is cooperative. To the decision there must be brought to bear all the technical experience and competence of the agency since the rule as issued should be based upon a synthesis of all the technical information available, as well as the combined judgment of the staff of the agency.

An agency in adopting rules, whether pursuant to the informal or the formal procedures of the Act, may not have those rules become effective under ordinary circumstances until 30 days after their publication in the Federal Register (subsection 4(c)). The reason for this 30-day interval is to allow persons affected by the rules sufficient time to conform to them so as to avoid legal consequences of violation. But Congress has wisely recognized that such a 30-day lapse would not allow agencies to meet all situations, such as cases of emergency. And so, the 30-day requirement need not be followed where an agency finds good cause for not doing so and publishes that cause with

Commission when he testified on the Federal Administrative Procedure Bills in 1945. Commissioner Aitchison referred the House Committee on the Judiciary to a case in which it was necessary for the Interstate Commerce Commission to make its final decision almost immediately after the testimony had been completed without an intermediate report. (Hearings before the House Committee on the Judiciary, 79th Cong., 1st Sess. (1946) on the Federal Administrative Procedure Bills, Serial No. 19, p. 60.)

the rule. The 30-day requirement is not applicable to rules granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy. They may become effective immediately.

Finally, any interested person is accorded the right to petition for the issuance, amendment or repeal of a rule (subsection 4(d)). This right is applicable to procedural and organizational rules as well as to substantive rules, subject of course to the exceptions that have been heretofore noted to the rule-making requirements (i.e., rules involving military, naval, or foreign affairs functions of the United States, courts martial, Selective Service, etc.).

Agencies will not have to comply with the notice and procedural requirements of the Act merely by reason of the fact that an interested person petitions for a rule. An agency may deny the petition without rule-making procedures at all, provided only that it furnishes the person who has requested the issuance of a rule with notice of its denial and a simple statement of the reasons therefor (see subsection 6(d)).

This is rule-making under the Administrative Procedure Act.

DISCUSSION PERIOD

FEBRUARY 8, 1947

The Session Convened at 9:30 a.m.

COMMISSIONER BENJAMIN: I would like to ask Mr. Reich probably a rather complex question about the definition of Section 2(c). I have been puzzling over that section for months and I cannot yet make out what it means, nor can I make out what some of the effects of it will be. That is, it seems perfectly clear that it departs from the traditional definition of "rule" and it seems perfectly clear that it engenders some things that had never been called rules. But where it stops engendering new things I am unable to find out because it includes the words "general or par-

ticular applicability." That "particular" is a complete change in the concept of "rule." And then it goes on and says "and future effect." So that if you stop there it would seem to include everything that any agency could do that has a future effect.

We were discussing last night with Mr. Reilly of the Labor Relations Board why a determination of an appropriate bargaining unit and the certification of employee representatives would not be a rule under this definition. Apparently the only reason is by implication because the introductory paragraph of Section 5 refers to certification as adjudication. But that is not a satisfactory answer since it does not affect the general meaning of this. Practically everything an agency does has future effect—even license revocation. I am unable to understand the definition or the reason for it.

What I would like to ask, among other things, is this: I heard a fairly credible report at the time this Act was being drafted that the reason for the inclusion of all these things that used to be adjudication in the definition of "rules" was that some of the agencies, notably the ICC, had objected to being included under the separation of functions provisions of the Act and that that was solved by changing the definition of "rule" so as to exclude everything that the ICC did. I do not know whether that is true or not. It sounds like an explanation, but certainly not a justification for all the confusion.

These are questions because I would like to know what Mr. Reich thinks about them.

I get confused again because rate-making is certainly rule-making under 2(c). But when I look at 5(c), the separation of functions, I find a sentence, "This subsection shall not apply to proceedings involving the application of rates or facilities of public utilities." Two pages back those have been defined as rule-making and therefore not under Section 5 at all. Yet 5(c) excludes something that is not under Section 5.

It was part of my purpose to point out that you can hardly avoid being lost in trying to understand what this statute is talking about. My question is whether the various confusions that I think Mr. Reich understands can be cleared up by him?

MR. REICH: I do not think it is too difficult to comprehend. The word "particular" was adopted for a definite purpose. I do not think it is fair to say that it was just for the purpose of ICC. It was for the purpose of including within the definition of rule-making all procedures of a quasi-legislative nature as well as those which involve subject matter demanding judgments based on technical knowledge and experience. The first draft of the bill, as I recall it, merely defined "rule" as a rule of general applicability. The Model Code, the one suggested for the States, has "rules" defined only in terms of rules of general applicability. Such a definition would not, however, take care of procedures such as rate-making and price fixing. The definition was accordingly broadened to include rules of particular applicability as well, and also mentioned specifically the approval or prescription for the future of rates, wages, corporate or financial structures, etc. The Supreme Court has heretofore recognized rate-making as being legislative in nature so that it is not a new concept.

There may be a certain confusion between the definition of rule-making and the definition of licensing because both of them use the word "approval." But I think there will not be any real difficulty in seeing which is which. The reason I say that is many of these have traditionally been considered either licensing or rule-making, as the case may be, and for the most part that tradition will be followed.

As far as corporate or financial structures or reorganizations and the others, they were included because agencies have pursued the same general type of procedure and the same general requirements as in rules of general appli-

cability. The fact is that in such cases policy considerations are predominant.

When we come to 5(c) and your wondering about it, I think that can be explained, at least easily for myself and I trust easily for you, Mr. Benjamin. Section 5 does not apply to rule-making. It applies only to adjudication. In many cases of rule-making there is not only the question of rates for the future—and I speak of the rate-making procedure because that is a common formal type of rule-making—but there must be considered what is known as the past reasonableness of rates. For example, a shipper may sue a railroad company for unreasonable rates that were charged. The shipper claims that the rates were higher than the reasonable tariff should have been. Now, in conducting such a reparation proceeding, an agency may find it is involved in a rule-making proceeding. I have really taken it in reverse. Let us put it this way: Many times when an agency is going into a rule-making proceeding, i.e., fixing the rates for the future, it may find that shippers will intervene and it will be determining what should have been the proper rate for the past. Thus you will have a reparation proceeding being conducted with a rule-making proceeding.

Since that was so, a number of the agencies felt that the requirement of separation of functions should not be applied to cases where they were considering past rates because they were so intimately tied up in many respects with the problem of making future rates. The Senate draft contained an exception merely for "past reasonableness of rates." Then you would have seen it clearly. When it came to the House draft, the framers of the legislation said, "That's too confining and not everybody will understand what 'past reasonableness of rates' means. So let us make it a little more inclusive to show that it will apply to anything where you are considering validity or application of rates, facilities or practices of public utilities or

carriers." This phrase refers to past rates as distinguished from future rates.

QUESTION: There are no similar past procedures as to facilities and practices that I know of. Those all look to the future. I think that is true as to reparation orders on rates.

MR. REICH: I think you are correct there. I do not know of any offhand. But I know the phrase was broadened so as not to be so confining in its nature. If you want the necessary reference, I can give it to you. It is in the House Committee Report, p. 52. That was the reason for its adoption.

QUESTION: There is one more thing along this line. I have been concerned also that maybe these that I would call adjudicating procedures by utility regulating agencies are given too free a hand. Assuming that you are going to prescribe procedures at all—I mean I am just assuming there is to be a procedure act—as I understand the Morgan case which was in this precise field, Chief Justice Hughes said explicitly that while this rate-making business was legislative in character, due process required it to be done by a quasi-judicial procedure. It has always seemed to me much clearer to think about the procedure as adjudicative, whatever the basic nature of the power is and that, therefore, it seems to me much clearer, if you are talking about procedure, to talk about it as one aspect of adjudication and to make clear that adjudication includes things that may be legislative in quality but that procedurally must be adjudicated. It seems to me the confusion in the Act which I still feel, arises from going at it the other way in trying to treat as "rules" something that nobody had ever called "rules" before and then require certain kinds of rule-making to be carried out as if it were adjudicated and still exempting it. Those rate cases might be the very cases in which some degree of separation of func-

tions should apply to some degree; perhaps not so far as with regard to other kinds of adjudication.

MR. REICH: I think if you tried to define the terms in the fashion you suggested, you would not be able to obtain those three exceptions for rule-making that are presently in the Act. In other words, the ones I talked about, namely, the use of written evidence, the absence of the requirement of separation of functions, and the ability to waive the decision of the presiding examiner.

QUESTION: If I were having a proceeding before the S.E.C. on the financial structure of a utility, I would hate to have it all done on written evidence. I mean there are some of those proceedings where I think you want to rely upon all the procedural safeguards of adjudication.

MR. REICH: In such a case the agency could not dispense entirely with oral evidence. May I say this: To the extent that there is a possible conflict of definitions between rule-making and adjudication, particularly licensing, you will note that the Act has tried to assimilate the procedure of licensing to that of rule-making.

I know that the classical definition of rule-making is in terms of rules of general applicability. In a recent article Professor Nathanson came to the conclusion, and I think it is warranted, that the definition of rule-making in the Act is a functional definition and that it should be thought of in that manner. I believe that Section 2(c) attempts to group together all those proceedings which might be considered fairly quasi-legislative in nature. There may be some adversary tint to them but for the most part they are determined upon broad questions of policy as distinguished from adjudication which, for the most part, is adversary in character.

QUESTION: Section 4 applies a partial exception to interpretative rules and we get a pretty good picture of what are substantive rules, procedural rules, and organizational

rules. I wonder if you could give us a little clarification as to what interpretative rule means in that section?

MR. REICH: A substantive rule is one which, as I have said, is intended to implement the statutory structure or the statutory powers of an agency. An interpretative rule is one which does not have the full force and effect of a substantive rule but which is in the form of an explanation of particular terms in an Act.

If you had an expression in a statute such as "Inter-urban Railway," the query might come up as to what is an "interurban railway." A particular agency may adopt a rule defining an interurban railway. That, in a sense, may be called an interpretative rule. On the other hand, suppose you had an Act which says, "The I.C.C. or the Railway Labor Commission may regulate all interurban railways and may pass such rules and regulations as are necessary for interurban railways." All the regulations that were issued under this power would be substantive rules as distinguished from interpretative rules. The courts have looked differently at interpretative rules than at substantive rules. A substantive rule, as you know, has the full force and effect of law. But an interpretative rule does not have the effect of law. The Supreme Court has often had difficulty in determining whether a particular rule is interpretative or substantive. In a broad sense, I think we can make the distinction I have tried to make. In a narrow situation, I am sure it is going to be more difficult, just like anything else.

It is quite difficult to make a definition which will include everything and exclude all others.

QUESTION: Mr. Reich, I have a question I want to ask you. Before I ask it, I might refer the gentleman who just asked the question about the interpretive regulations, to 29 Georgetown L. J. 1.

MR. REICH: Thank you.

QUESTION: I want to address my question to the two words at the end of the first sentence in Section 4(a), namely the words "issues involved." In your general discussion you said that notice should describe the issues. That question has been of great difficulty to those of us who practice under the Marketing Agreement Act both under the terms of the Act and under the rules of practice and procedure of the Department of Agriculture, which I understand are now in process of revision. Up until now we have had a great many interpretative regulations, most of which I felt were against me. When they changed their mind, I usually lost.

I wonder if you could give us any more detail or enlarge the thoughts you might have on what definiteness is required by the words "issues involved"?

MR. REICH: I think I can do it generally. I do not want to come in conflict with the Marketing Agreement people. I will say this: The Department of Agriculture has been very responsive in its attempt to comply with everything in the Act. They have put numerous people on this particular Act and I am sure that anything you get out of there, no matter what it was heretofore, will be very, very intelligent. I am sure it was heretofore, too.

Under Section 4, the agency will have to state the terms or substance of the proposed rule or give a description of the subjects and issues involved. Should the agency describe the issues involved, it would have to set forth everything of major importance in the rule and everything of minor importance which is of substance. I do not know whether this statement satisfies you. I can only speak generally. I do not know what they have done heretofore.

QUESTION: We had two or three examples of it. I do not know whether this is the time and place to go into it. They are fairly simple.

Suppose there is a provision in a milk order. Someone proposes that the provision be repealed. Does that raise

an issue as to whether the provision can be changed, revised, altered, or amended in any way? That is one question. Another question is, suppose there is a figure, \$5, in the provision of an order. Somebody says "Revise provision A," which is the one containing the figure \$5. May that figure be changed without limit, up or down, or should more definiteness be required as to what was the idea of the proposer for revision of the figure?

MR. REICH: You mean whether it is going to be up or down?

QUESTION: And how much.

MR. REICH: Of course, it should be done if possible. But I do not want to come in conflict with any particular agency.

QUESTION: It is purely a hypothetical question.

MR. REICH: Hypothetical questions are often very realistic. I think in general—and I am not trying to surround myself with any governmental immunity—that the public should be informed exactly what is intended to the extent that the agency knows, and if the agency is just seeking a general modification and may not know one way up or down, it might state that in so many words. Then, if you are not satisfied with the information you received, I am sure if you wrote a letter to the particular administrator that under present circumstances you would receive the proper information. Nobody is trying to hide anything and I feel certain that the agencies intend to comply with the law in every respect. To the extent that the information is not as complete as you desire, I think you could communicate with them to find out more. I thought you were going to ask me about a notice wherein the agency says: "We are going to change paragraph 'A' (which happens to be about two pages long) and at the nine hundredth line we are intending to change the comma to a semi-colon." We have suggested that hereafter agen-

cies repeat the whole paragraph and underline the new phase of it so that the public can see it better. Agencies will proceed in that fashion. There will be intelligent compliance. I hope you feel that despite victory or loss we in the government are trying to do our best.

QUESTION: I do not know whether you want to discuss the question of judicial review of rule-making powers or not, but I do not know whether that fell within your field?

MR. REICH: I would not mind discussing it but I understand Mr. Dickinson is going to be here this afternoon and he's going to discuss it.

DEAN VANDERBILT: I am not sure how fully he will cover it but I think it would necessarily be involved in the subject.

MR. REICH: I do not want to avoid anything.

QUESTION: I just did not want to press you for a discussion of that.

MR. REICH: He's going to cover it but I would not feel pressed if you would like to ask me.

QUESTION: To what extent would the average practitioner be protected by the oral instructions which seem to go from higher-ups down to the people at the desk when the formal hearing or proceedings seem to be so well conducted that no court on certiorari would interfere with them? In other words, we know that in these agencies there are certain oral instructions being shoved around. What can we do about that? That refers to rule-making and adjudication.

MR. REICH: By oral instructions you mean that when an examiner is conducting a proceeding, he's told what to do? Is that what you mean?

QUESTION: No, not when he is proceeding. But somewhere under the surface we have people from above tell-

ing people on an adjudicating case or some rule of that kind, "This is how we feel the thing ought to be done."

MR. REICH: Oftentimes I wonder why people serve in the government, because they are subject to a lot of abuse. The hearings on Lilienthal are very typical. There is a man trying to do a great public service and he's going through a terrific amount of abuse.

On this idea of oral instructions, there may be something along that line. But when you say oral instructions and say it generally, I take real exception to it. Nothing personal about it, but as a public servant I take exception to it. I think by and large that public servants are out to do a positive job. I am not here to defend public servants but I feel impelled under the circumstances. At least to my knowledge in the government, and in the experience of my friends, we do not get any of these so-called oral instructions, such as, "There is a particular case, handle it in this fashion." In most situations the poor man from the outside or the rich man from the outside receives substantial justice from the government. I do not think there are these clandestine instructions, these so-called oral instructions.

Sure, I can see in a rule-making case you might tell an examiner that in general these are the issues that are going to be faced. If that is an oral instruction, all right. But I am sure, if not heretofore, certainly now, there are not going to be any improper oral instructions and to the extent you find them and you can present the necessary evidence, the proceeding would be upset by any court.

QUESTION: It seems to me there is a little mix-up in that question between instructions to find an issue of fact one way and instructions with regard to policy. It seems to me perfectly proper for an agency to discuss with its staff its general policy in the interpretation of an act, including discussion with trial examiners who will otherwise often

go so far afield that the tentative report will not present the issue on which the case is finally decided.

DEAN VANDERBILT: On the rule-making side only.

QUESTION: On the adjudicating side when they talk about, "our general interpretation of the act," or, "our policy is," just as judges will get together and talk over questions of law which they will later apply, and questions of public policy which they will later apply in adjudication. I have seen trial judges and appellate judges in this state discuss cases with other judges and discuss cases with lawyers.

DEAN VANDERBILT: Would a judge who has a trial before him confer with the judges of the Appellate Division as to what their view on the law would be?

QUESTION: I am talking about general policy, not in relation to a particular case.

DEAN VANDERBILT: That was the reason why I was seeking to limit the question to the rule-making side. There I do not see any trouble. But on the other side I would definitely feel hurt if I knew it was general.

QUESTION: The other day Mr. Jeter Ray, the Solicitor of the Labor Department, stated that they issued a regulation designating the Wage and Hour Division or the Administrator of the Wage and Hour Division as an agency, frankly, for the purpose of avoiding 5(c), the separation of functions provision, so that he would have the authority to combine both the adjudication and prosecution.

Now, I would like to know how far any agency can go in designating sub-agencies as agencies for that purpose?

MR. REICH: That's a very good question. You can see how frank agencies of the government can be.

I do not know the true answer to Section 5(c). I am

wondering about it myself. I think under the language there, anybody can be an agency; certainly anybody who has final power to decide could be an agency for the purpose of 5(c) and thus be subject to the exception to 5(c).

The only difficulty I have with that is knowing the background of 5(c). I do not believe any agency should go to the extent of trying to make a subordinate an agency for the purpose of removing the requirements of 5(c). That was not the purpose of it. The purpose of the exception was to recognize that most agencies have combined in them both prosecuting and deciding functions and since that is so, there must be a recognition that the top agency must not only prosecute but must decide, and that both functions must be incorporated in the agency head. The extent to which that goes down the line is difficult to say. To a little subordinate in the field, I would say no; to a Wage and Hour Administrator who has statutory functions I think it could well be that he should be an agency because the statute recognizes him as an agency for certain purposes. I believe under the Fair Labor Standards Act he is given final authority in many matters. Since the statute recognizes that, there is no question that he is the agency for that purpose.

When you consider people who are in a directorial status in Washington and who are the heads of big divisions like the Director of Indian Affairs in Washington, I think it is realistic to say that such persons could be in charge of an entire program and be considered an agency for the purposes of Section 5(c). In persons of such stature, you do not have the difficulty in combining investigative and prosecuting functions. You have it more so in an individual in the field. But the exact limits of it I could not say. With the Wage and Hour Administrator, a statutory officer, I do not think you would have the difficulty.

QUESTION: If I may say a word of comment to that last remark as a member of the Department of Labor, I do

not think that it was quite accurate to say that the Administrator of Wage and Hour Contract Division was an administrator for the purpose of exercising that function. The Administrator of the Wage and Hour Contract Division is exercising that power pursuant to the delegation of authority by the Secretary of Labor since 1941 or 1942, long before the Administrative Procedure Act. To say that the Administrator was made an agency for the purpose of evading Section 5(c), would seem to me to be quite far-fetched.

I would say that in order to conform more closely to the provisions of the requirements of Section 5(c) the Administrator was given the final decision-making power where before he exercised only initial decision-making power and that was the only change that was effected in order to comply, not to evade Section 5(c).

ADJUDICATION BY FEDERAL AGENCIES UNDER THE ADMINISTRATIVE PROCEDURE ACT

ASHLEY SELLERS

INTRODUCTION

The principal provisions of the Administrative Procedure Act which deal with adjudication by administrative agencies are Sections 2(d), defining the term "adjudication"; Section 5, specifying the content of the notice of hearing, providing for informal disposition where practicable, requiring separation of functions in specified instances, and authorizing issuance of declaratory orders; Section 7, relating generally to the taking of testimony and including (a) designation of the class of officials eligible to preside, (b) enumeration of the powers of the presiding officers, (c) prescription of the requisite rules of evidence, and (d) definition of the hearing record; Section 8, stating the extent to which an agency may or must give recognition in its decision of cases to the actions of subordinates who presided at the reception of evidence and defining the rights of the parties to post-hearing procedures; and Section 11, relating to the appointment and tenure of examiners. These are the provisions which will be considered on this occasion.

Certain other provisions, dealing especially with licensing, pertain to adjudication inasmuch as, by express provision, adjudication includes the licensing process. These provisions are Sections 2(d) and 2(e), defining the terms; and Section 9(b) directing prompt disposition of applications for licenses, requiring agencies to give opportunity for compliance before the institution of proceedings to suspend or revoke licenses, and permitting licenses to remain in effect pending final agency determination of applications for renewal.

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A third group of provisions pertain to adjudications under the Act, but inasmuch as they are applicable also to rule-making, they are not of particular concern here. These are Sections 6, governing appearances and representation in administrative proceedings, confining inquisitorial and investigative powers to instances authorized by law, governing the issuance and enforcement of agency subpoenas, and providing for prompt notice of denial of written applications, petitions, or requests made in connection with any agency proceeding, together with a statement of grounds for such denial.

Within the coverage of all of the foregoing provisions, the applicability of the Act to adjudication by agencies may be picked out. First, however, certain preliminary observations should be made.

PRELIMINARY CONSIDERATIONS

The statute is built around two basic distinctions:¹ (1) between legislative or rule-making functions, on the one hand, and judicial or adjudicative activities, on the other; and (2) between informal and formal dispositions.

As to the first, the Act adopts a familiar pattern of classification. Some may question the definition of a "rule" to embrace action of particular as well as of general applicability. On the other hand, while legislation is normally applicable generally, it is frequently general only in form—such as a statute relating only to cities having a population of not less than 100,000 and not more than 101,000, where notoriously only one city in the state falls, or is likely in the foreseeable future to fall, within that description—and often is expressly addressed to a particular named individual—such as an act for the relief of Mrs. Philomena Xerxes to recompense her for the loss of a crumpled-horn cow known as Daisy who was killed in the

¹ These have been elaborated upon by Representative John W. Gwynne in "The Architecture of the New Administrative Procedure Act" (1946) 32 A. B. A. Jour. 550.

crash of an Army plane. At any rate, adjudication, i.e., the process of formulating an order, as defined in the statute, embraces all forms of agency action other than rule-making. Thus, adjudication under the Act is determinable by what is not rule-making.

Some who have observed this open-ended treatment of terms mistakenly have concluded that the adjudicatory procedures prescribed by the statute are applicable to agency functions which heretofore have in no manner been subject to procedural requirements. The answer is found in the exceptions which are liberally though carefully interspersed throughout the Act.² In the main, at least with respect to formal adjudication, these exceptions appear in the introductory language of Section 5, and make that section and, in turn, Sections 7 and 8, applicable only in instances of adjudication required by other statutes to be determined on the record after opportunity for hearing, and, even in such instances, are applicable only to the extent that the six classes of matters or functions enumerated in the introductory language of Section 5 are not involved.

The distinction in the Act between rule-making and adjudication is significant for present purposes not only because the scope of the term "adjudication" is dependent upon the content of the term "rule," but also because most of the provisions in Sections 7 and 8 are applicable to formal rule-making as well as to formal adjudication. For this reason some of the present discussion overlaps that of Mr. Reich, who has preceded me here this morning.

The distinction made in the Act between informal and formal adjudications is somewhat less apparent than that made between rule-making and adjudication. The provisions for formal adjudication are explicit and complete; provision for informal adjudication is left largely to implication. I have had occasion elsewhere to discuss in some

² These have been listed and explained elsewhere. See Sellers, "Exceptions as to the Administrative Procedure Act," (1946) 32 A. B. A. J. 749.

detail the applicability of the Act to informal adjudication. For present purposes, it would appear sufficient merely to quote an excerpt or two from the observations there made:

. . . it may appear, superficially, that the statute makes no provision for administrative procedure in adjudications not required by statute to be made on, or after opportunity for, an agency hearing. On the contrary, however, the statute in effect—although perhaps not in appearance or form—provides fundamentally for informal adjudication procedures.

Unlike rule-making, as a matter of fundamental law adjudication requires notice to the parties affected before administrative action may become final and binding without recourse. Sections 6, 9, and 10 of the act taken over from that point . . . ³

Why is virtually an entire section of the statute given to informal rule-making, while no section or subsection applies to informal adjudication? The reason would appear to be, simply, that a statutory right and form of informal rule-making procedure had to be largely invented and hence was given a section of its own. Informal adjudications, on the other hand, have long been an established (although perhaps complex, fragmentary, and sometimes uncertain) phase of administrative law as applied by the federal courts so that it was more convenient to follow the general structure of the existing law in that respect with no more than the addition of such amplifying and clarifying provisions as are to be found in Sections 6(a), 6(d), and 10(e)(6). . . ⁴

FORMAL ADJUDICATION

Section 5. Adjudication.—Section 5 is the real starting point in a consideration of formal adjudication under the Act. Its introductory language defines the classes of proceedings to which the procedures prescribed in Sections 5, 7, and 8 are applicable. As noted above and, because of its significance, may well be noted over and over again, Sections 5, 7, and 8 apply only in instances of adjudication required by other statutes to be determined on the

³ Sellers, "Informal Dispositions Under the Administrative Procedure Act," (1946) 32 A. B. A. Jour. 642 at 647.

⁴ *Ibid.* at p. 648.

record after opportunity for agency hearings and, even in such instances, are applicable only to the extent that none of the six enumerated types of proceedings or functions is involved. Thus, except with respect to the selection or tenure of examiners appointed pursuant to Section 11 of the Act, Sections 5, 7, and 8 require no hearings which are not otherwise required by law.

Section 5(a) prescribes the content of the notice of hearing or other form of moving paper; entitles a private moving party to responsive pleadings in all classes of cases; and requires due recognition of the convenience of the respective parties as to the times and places for hearings.

Section 5(b) is intended to facilitate settlements or consent dispositions of cases by providing to the parties a statutory right to an opportunity for such dispositions even though they may be entitled to a hearing, subject to the limitation that "time, the nature of the proceeding, and the public interest permit." According to the House Committee Report,⁵ the limitation

... is intended to exempt only situations on which (1) time is unavoidably lacking, (2) the nature of the proceeding is such that the number of parties makes it unlikely that any adjustment could be reached, and (3) the administrative function requires immediate execution in order to protect the demonstrable requirements of public interest in the due and timely execution of the laws.

Section 5(b) provides further that, to the extent that informal disposition is not made, the matter shall proceed to hearing and decision in conformity with Sections 7 and 8.

The separation of functions provisions in Section 5(c), though they operate in perhaps the most bitterly contested of the fields of administrative procedure, have been drafted so meticulously that even the most ardent advocates of freedom of agency action can risk their endorsement.

⁵ H. Comm. Rep. No. 1980, 79th Cong., 2d Sess. (1946) pp. 27, 30.

Essentially, Section 5(c) provides that no agency official participating in the decision of a case shall consult *ex parte* with any person or party on the facts in issue; nor shall such official be subject to the supervision of agency personnel engaged in investigative or prosecuting functions. Conversely, investigative or prosecuting personnel may not participate in the decision of cases. In other words, the prosecutor shall not be also the judge. This age-old maxim of good government thus becomes clearly a rule of law, and possibly brand-new law, for, curiously enough, court decisions recognizing the rule are surprisingly obscure.

The separation of functions requirements, though clearly provided, operate within an irreducible minimum of situations. In the first place, they are subject to all the exceptions of applicability governing all of Section 5. Secondly, the concluding sentence of Section 5(c) precludes its applicability (1) to proceedings involving applications for initial licenses, or involving "the validity or application of rates, facilities, or practices of public utilities or carriers," or (2) to "the agency or any member or members of the body comprising the agency." Separation is not required in the Interstate Commerce Commission, for example, when it is determining an application for a certificate of public convenience and necessity, or in any of its rate proceedings. It would be required in that agency, however, in a proceeding to revoke such a certificate or other form of license. It would be required also in the Federal Communications Commission in a proceeding to determine an application to renew a broadcasting license. The exception last mentioned—of the agency itself or the members of the board who comprise it—exempts the top agency authority from the requirement. Thus, for example, the members of the Securities and Exchange Commission, in whom are vested both prosecutive and adjudicative powers, personally may exercise both functions, though it would be better practice, in the opinion of the

framers of the Act, for the top agency personnel to:

confine itself to determining policy and delegate the actual supervision of investigations and initiation of cases to responsible subordinate officers.⁶

Section 5(d) is a grant of authority to agencies—one of many such grants in the Act—to issue declaratory orders paralleling the declaratory judgment powers of courts. The authority to issue such orders, however, is confined to cases of adjudication to which Section 5, as defined in its introductory language, is applicable in general.

In part, Section 5 deals with the prehearing stage of formal adjudication. Sections 7 and 8 consider the hearing and deciding stages, respectively.

Section 7. Hearings.—Section 7(a) specifies the classes of officers or employees who may preside over formal agency hearings, and provides a statutory code of ethics governing the presiding function. Though in form restrictive, this subsection, together with the separation of functions provisions of Section 5(c), the grant-of-hearing powers provisions of Section 7(b) and the appointment and tenure provisions of Section 11, is designed to increase the stature of the trial examiner by insuring, on the one hand, that the presiding function shall not be indiscriminately assigned within the agency and by providing, on the other hand, security of tenure and opportunity as well as obligation to exercise independent judgment and decision.

The hearing powers listed in Section 7(b) are granted only in a limited sense, i.e., this provision merely authorizes agencies, if they otherwise are invested with such powers, to delegate them to hearing officers. Nevertheless, the provision is exceedingly useful. It makes possible, for example, the delegation of the agency's subpoena power (if it has any) to examiners even in instances in which

⁶ H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) at 30-31.

heretofore the courts have refused to permit such delegation by implication.⁷

Section 7(c) provides in part that

... any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence, and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.

This language makes it clear that the rules of admissibility of evidence are frowned upon and that the emphasis should be upon the nature of the evidence to be relied upon. Only "reliable, probative, and substantial" evidence may be considered. This merely restates the substantial evidence rule long established in administrative law. While the rule is stated again in the judicial review provisions, its insertion in Section 7(c) is a direction to the agencies to require its observance not only in the making of the ultimate agency decision but in the making of any initial or intermediate decisions as well. The rule does not, of course, satisfy many who have urged establishment of the requirement that agencies, like courts, should act only on the weight or the preponderance of the evidence.

Since enactment of the Administrative Procedure Act, the Federal Trade Commission has revised its rules of practice so as to provide in part as follows:

(d) All findings, conclusions and orders recommended by the trial examiner shall be based upon the whole record and supported by reliable, probative and substantial evidence (including facts of which he may take official notice). No findings shall be recommended except such as he deems supported by the greater weight of the evidence.⁸

⁷ See *Cudahy Co. v. Holland*, 315 U. S. 357, 62 Sup. Ct. 651, 86 L. ed. 895 (1942).

⁸ Federal Trade Commission—Rules of Practice, 16 Code of Fed. Reg. 2.22(d), as last revised, effective Dec. 11, 1946, 11 Fed. Reg. 14233 (Dec. 11, 1946).

A glance at this newly published rule may give the impression that the Federal Trade Commission has misconstrued the Administrative Procedure Act, especially since the Commission's "greater weight" rule was published for the first time immediately following enactment of the statute. Informal inquiry within the Commission results in the information that the "greater weight" rule originated in an interpretation of the Commission's parent legislation, and that its publication at this juncture stems not from Section 7(c) but from the public information provisions of Section 3 of the Administrative Procedure Act.

Section 7(c) also entitles every party to submit either oral or documentary evidence and "to conduct such cross-examination as may be required for a full and true disclosure of the facts." Submission of evidence in written form may not be compelled except in rule-making or the special classes of adjudication set forth in the last sentence of the subsection. Even if permitted, submission of written evidence may be subject to the right of cross-examination.⁹ To the extent that cross-examination of written evidence is insisted upon and upheld, the privilege of submitting written evidence becomes less important, inasmuch as the principal advantage of resort to written evidence is the avoidance of the necessity of personal attendance at the hearing. The right to cross-examine, however, when appropriately insisted upon, is given the proper preference.

Section 7(d) designates as the "exclusive record for decision" in formal administrative proceedings "the transcript of the testimony and exhibits, together with all papers or requests filed in the proceeding." Provision is made for the taking of "official notice"—the administrative counterpart of "judicial notice"—but with the limitation that, where:

an agency decision rests on official notice of a material fact not

⁹ Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945) p. 22.

appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 8. Decisions.—Turning now to the procedures required with respect to the decision of formal cases, Section 8(a) authorizes agencies to delegate to presiding officers, i.e., to those who presided over the taking of the evidence, the power to make the final agency decision. Where, on the other hand, the head of the agency desires to make the final decision, it may do so either by undertaking the initial as well as the final decision or—as is usually the practice—by providing for agency review of the initial decision of the subordinate. In any event, if a subordinate officer, rather than the agency itself, has presided at the hearing, he has a recognized part in the deciding process. Either he makes the initial decision—which may or may not become final—or he recommends a decision. This procedure is mandatory except in rule-making or in determining applications for initial licenses, in which event the two numbered optional procedures set forth in the last sentence of the subsection become available to the agency.

Opportunity is afforded the parties, pursuant to Section 8(b), to submit proposed findings and conclusions, or exceptions, and supporting reasons for such exceptions or proposed findings or conclusions, as the case may be, prior to each recommended, initial, tentative, or appellate decision. All rules on findings, conclusions, or exceptions, as well as all decisions, become a part of the record, and the decisions must state the findings and conclusions, together with “the reasons or basis therefor,” and “the appropriate rule, order, sanction, relief, or denial thereof.” According to the legislative history,

... the mere parroting of findings or conclusions in the words of statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirements of this section unless both the statute and the issue were very narrow indeed. Almost any case of consequence involves numerous

and detailed issues of law, fact, and discretion. These must all be determined as a part of the decision.¹⁰

Section 11. Examiners.—This necessarily rapid review of administrative adjudication under the Administrative Procedure Act permits only brief mention of the further pertinent provisions of Section 11, relating to appointment, compensation, and tenure of the examiner who presided over hearings and rendered decisions pursuant to Sections 7 and 8. Under these provisions the agencies select their examiners from personnel determined by the Civil Service Commission to be qualified and competent. Once so appointed, the examiner may perform no duties inconsistent with those as examiners; must be assigned to cases in rotation where practicable; and receives compensation prescribed by the Civil Service Commission "independently of agency recommendation or ratings." They are subject to removal only for good cause determined by the Commission and only after opportunity for a hearing conducted under the procedures provided in Sections 7 and 8.

This portion of the Act will not become operative until June 11, 1947. Once these provisions become effective, administrative adjudication under the Administrative Procedure Act will be in full sway, subject only to the limitation in the last sentence of the Act that "no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement."

DISCUSSION PERIOD

FEBRUARY 8, 1947

The Session Convened at 10:45 a.m.

QUESTION: You say the Federal Trade Commission apparently misinterpreted (at first glance) Section 7(c),

¹⁰ 92 Cong. Rec. 57 at 59 (May 24, 1946).

putting in of the greater weight of the evidence rule. Does that not follow from the first sentence of Section 7(c) about the burden of proof?

MR. SELLERS: I think not. The burden of proof has no necessary relationships to the quantum of proof required. To meet the burden of proof does not mean that the proponent must make out a case on the preponderance of the evidence.

QUESTION: It does not imply that?

MR. SELLERS: I do not believe so. At least it has not been so construed. I do not think there has been any question. However much some people may have wanted it, there has never been any question as to the rule of evidence in effect under this statute, namely, the substantial evidence rule. I have heard no claim made that this statute has any other rule of evidence than that.

QUESTION: Somebody raised a question the other day about Section 11 (not here) which I had not thought of and that is the provision for assigning cases in rotation so far as practicable.

I would like to know what you think about what "so far as practicable" means. Does it mean that if an agency has a great variety of cases and they find it desirable to have examiners specialize, or in a particularly difficult case to assign that very difficult case to the examiner who happens to be clearly most capable, that it would be unable to do so, or does this require a mechanical rotation of the kind which you certainly would not have in the District Court here, for instance, where cases would be assigned to judges somewhat according to their capabilities or in the state courts where judges are assigned a special term according to their capabilities in the judgment of the higher court?

MR. SELLERS: It seems to me that you have to construe the phrase "so far as practicable" in terms of the obvious

concept in which the entire section is framed; namely, that the agency shall not by the exercise of supervisory power punish an examiner because he has ruled against them in a given case or single him out, and that sort of thing. Obviously, however, it was not intended to apply a purely mechanical rule on the agency and prevent it from classifying its examiners according to types of work that it had to perform. In the Department of Agriculture, for example, this would not be required because there may be some examiners there who know a great deal about a given Act but who know very little about some other Act and so on. In such instances, the Department may take into consideration the particular expertness of the respective examiners and make assignments accordingly. That, as far as I would interpret it, would be perfectly permissible under the Act provided that it was clear that, in the type of assignments that were made, they were not based upon considerations other than the capabilities of the examiners in question.

In perhaps partial answer to Mr. Benjamin's question too, I think the Civil Service Commission, at least tentatively, has taken the view that Section 11 has not changed the Classification Act requirements, so that some trial examiners are classified as P-7, others P-6, and others P-5, and in making assignments of examiners regard may be had to the particular classification, which presumably takes into account the capacity of the particular trial examiner to handle difficult or simple cases.

There will be a two-way classification, if in interpreting this statute, the Civil Service Commission follows the present indications as to what they are going to do. There has been nothing official, but if the Commission follows what none of us believe they are going to do, there would be different grades of examiners. There is some question as to what should be the minimum grade. Let us assume that the minimum is P-5 or P-6, and goes up to P-8. At any rate the classifications have to have some reference

both to the individual involved, that is as to his experience, background, and capacity to become the most competent type of examiner and, second, as to the nature of the type of work which he is to do. In some agencies the type of cases that all the examiners perform are not comparable in complexity and in difficulty with those that exist in some other agencies and it is thoroughly permissible, as I understand, to make that differentiation.

QUESTION: I was wondering, Mr. Sellers, what you thought about the result flowing from the requirement that trial examiners who received the evidence make the initial or recommended decision unless they become unavailable to the agency? Let us assume that a trial examiner has heard the evidence and then becomes unavailable, let us say by death, which would be clearly within the contemplation of the statute. What may the agency do? In your view may the agency then assign the case to another trial examiner to prepare a recommended decision, that trial examiner not having heard the evidence himself, or, must it conduct a new hearing or must it make a proposed decision on briefs?

MR. SELLERS: The Act requires the agency to utilize the examiner who heard the evidence to the extent that he is "available."

QUESTION: I assume that he is dead so that there is no problem of availability.

MR. SELLERS: It contemplates that unavailability has some substance—he is either dead or is otherwise physically unavailable, and not merely that somebody told him to stay away.

QUESTION: I assume that he is dead or insane, in my case.

MR. SELLERS: I think in that case the agency could have a substitute examiner who would not have to go through

another hearing and take the evidence all over again. The only question is whether, in selecting an alternate, he is one who is eligible under the other provisions of the Act.

QUESTION: I suppose then that you have also answered the other question, that is, the Board or Commission, instead of asking another trial examiner to prepare the proposed decision, could itself prepare a recommended decision, because under the statute the agency or a trial examiner appointed pursuant to Section 11 is qualified to hear the case?

MR. SELLERS: That is right. The agency could reach down and take it also.

QUESTION: I am wondering what would be your view of a respondent objecting to a substitution of a new trial examiner after the evidence had been heard?

MR. SELLERS: That is where the agency insists on substituting another examiner?

QUESTION: Because of unavailability of the first examiner?

MR. SELLERS: I think the respondent's objection would not be of too much avail, unless the parties want to waive the initial decisions. If I get your question correctly, you are not talking about waiver of any rights involved?

QUESTION: I have in mind a situation where the respondent insists that the examiner who is now coming into the case is deprived of observing the demeanor of the witnesses and the personal touch that he would get that the first examiner got. For instance, the observation on the appearance of minors, whether or not they are under age is important, and the testimony of witnesses who were seen. The respondent takes the position that observation of the witnesses is an essential part of a fair hearing to him.

MR. SELLERS: Of course, that is the basis for this insistence that the man who heard the evidence shall write the decision when he heard it in the first instance. My only point is that the statute goes as far as it can towards the realization of that goal, but allows for contingencies, and I would doubt that you would have to have a hearing all over again. It would be a question of the reasonableness of a particular case.

I could conceive of a particular type of case, where the evidence was so completely of the type that you mentioned, that perhaps the case should be sent back. But normally I would think not.

QUESTION: Under Section 5(a), the second sentence provides, "In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law." Does not that mean that where a private party files a paper with an Administrative Agency the agency itself has to give notice of the issues controverted?

MR. SELLERS: That means that where the private party is the moving party and therefore has subjected himself to all the requirements of any party movant—that is, his petition will have itself to be sufficiently detailed so as to constitute a valid moving paper—then the agency in such event would have to answer it.

QUESTION: In most instances is not the agency at that stage in a position of being impartial and it does not wish to controvert?

MR. SELLERS: That is not the theory of this Act. The theory of this Act as to this type of proceeding is that the agency is a party and that there is no presumption of impartiality merely by virtue of the fact that it is a government agency rather than a private party.

QUESTION: Are you answering questions on Section 9?

MR. SELLERS: I am going to try.

QUESTION: I asked Carl McFarland this last week but I still do not understand. The second sentence in Section 9, which says, "Except in cases of willfulness or where public health, interest or safety requires otherwise, no license revocation or suspension shall be instituted until the parties have been given in writing an opportunity to demonstrate or achieve compliance." Mr. McFarland said that no agency had objected to that. I have never been able to see why the opportunity to demonstrate or achieve compliance should have to precede the institution of a license revocation proceeding, and I can see a good many reasons why it should not. The only time when it should, it seems to me, is if the institution of the proceeding is going to be publicized to the damage of the licensee.

MR. SELLERS: Which would be the case, would it not, in the institution of any proceeding?

QUESTION: Not necessarily. There are many license revocation proceedings that are not worth a lot of publicity. In fact, I do not know what proceeding except SEC or big FCC proceedings would get that kind of publicity at all. I mean there are various licenses in the Agriculture Department, are there not?

MR. SELLERS: Yes.

QUESTION: And revocation proceedings which do not get any publicity at all?

MR. SELLERS: Well, not publicity in the sense of the general public. But I am sure it would be true that, in the trade or in the particular quarters in which publicity would be especially important to the party, it gets a great deal of publicity. In this day and time, with publicity and trade channels so highly organized, there is not a trade that does not have its own association and a particular method of dissemination of information. They find out

about everything that goes on in any public proceeding and immediately it is pretty well publicized to the trade. That is the theory behind this provision, to protect a person from being hurt by a revocation proceeding being instituted against him without being given a chance to comply, but subject of course to the tremendously broad safeguard clause as it appears in the introductory portion of the statutory preceding sentence in question. As a matter of fact, the language in the beginning of the sentence is so broad that I cannot see too much sting to the sentence itself, "Except in the cases of willfulness," etc.—In most instances you could almost stop at that point because those would be the types of cases, the cases of willfulness, where the agency would normally not give an opportunity for compliance—"Except in cases of willfulness, or those in which public health, interest or safety requires otherwise." The phrase is so broad as practically to limit the applicability of this section to situations where there could not be much concern to the public interest.

QUESTION: You are going to have an issue on judicial review each time though, are you not, as to whether that initial clause, that justification, actually existed?

MR. SELLERS: You may.

QUESTION: That's what bothered me about it. It seemed awfully far-going. And then if I may, there is one other problem there. Is there any implication, as some people have thought, in the phrase "demonstrate or achieve compliance," that everybody has to be given an opportunity to achieve compliance even though the agency thinks that its past non-compliance is a sufficient ground for suspension? I can see cases where it is a question of achieving compliance, but I can see others where the question of achieving compliance would be really irrelevant and where the suspension might occur even now.

MR. SELLERS: It is something that is capable of proof as having happened. There is no future proof required.

QUESTION: Achieve means the future, though. You have to give them an opportunity to be good.

MR. SELLERS: I can see your difficulty, and there is a difficulty there. Certainly no man has a right when the agency approaches him and says, "We are going to take away your license because you are violating," to reply, "Oh, no. The Administrative Procedure Act gives me an opportunity to achieve compliance and that gives me an indefinite period of time. I can constantly be 'achieving compliance' from now on out, and you can never get after me." I think there is obviously a reasonable time limit.

QUESTION: Mr. Sellers, in connection with the provision Mr. Benjamin was talking about, you mentioned the fact that the last section of the Act provided that no procedural provision of the Act shall be mandatory upon any agency at the time there is a pending proceeding. Is this not substantive rather than procedural, and in your opinion would it not apply to pending proceedings?

MR. SELLERS: I think not—not unless it is already required by law.

QUESTION: You think that that is purely procedural?

MR. SELLERS: That is right. I think that virtually everything in this statute is purely procedural. A generalization should not be made about the few provisions that are not.

QUESTION: It would just seem to me, if the revocation of a license is threatened, that to demonstrate or achieve compliance before the proceeding involve a substantive right rather than merely procedural because that really affects the whole question of the right to the license.

MR. SELLERS: That is possible—to argue that it is a substantive right—but I had not thought of it that way. Of course, if it is a substantive right that is different and

you could not apply it to a pending proceeding or any other proceeding. But I do not see how you could call this provision substantive where its effect is to forbid the institution of an administrative proceeding until adequate warning has been given.

QUESTION: I was just wondering whether it might be incumbent upon the agency to terminate the proceeding and give notice before they go on?

MR. SELLERS: I would be interested in seeing a decision of the court on that point. I do not think you would get very far.

QUESTION: I think also that the legislative history suggests that in writing the statute Congress did not contemplate changing any substantive law. It is true that many procedural aspects of the Act may affect substantial rights of citizens. But I think that the theory upon which the Act has been framed is based upon the notion, more or less, that substantive law remains the same, but the administrative procedures to be followed have been changed. I would agree with Mr. Sellers.

QUESTION: That is an awfully fine line of distinction, though, one that frequently cannot be determined clearly.

QUESTION: That raises another interesting question, it seems to me, as to whether the judicial review provisions of the statute have immediate effect. Assuming that judicial review has been broadened—and I am not thinking of the substantial evidence rule so much because I agree that the substantial evidence rule has been left intact—perhaps there are more reviewable acts than heretofore and so on. That is an enlargement of the judicial power. Do you think Section 12 would prevent a court, which got a case today that would not be subject to the administrative procedures of the statute, from reviewing the case and applying Section 10?

MR. SELLERS: My interpretation of it is that any case that started, that is, arose out of an administrative proceeding that began before this Act was passed, is not in any way subject to this Act, judicial review as well.

The only court case that has come to my attention involving the Administration Procedure Act was in Cleveland, involving the Agricultural Marketing Agreement Act, where the attorneys for the milk handlers who were challenging the Secretary of Agriculture's order argued that the Administrative Procedure Act, although admittedly not applicable, had a bearing upon their case. Of course, the court did not rely upon the Administrative Procedure Act, but, nevertheless, did comment upon the Act. As a result, we have a court decision interpreting the Administrative Procedure Act even though the court began its opinion by saying the Act was not applicable.

QUESTION: In Section 7(c) the second sentence prohibits the presiding officer from consulting any person or party upon any fact in issue unless upon notice or opportunity to participate. Supposing the presiding officer has the assistance, let us say, of statisticians in computing damages or has other assistance in the disposition of the case. Would he have to give notice of opportunity to all the parties? The assistance that I speak of is the assistance rendered to the trier of fact in the agency.

MR. SELLERS: Are you sure that the type of proceeding we are talking about is one which would be subject to 5(c) anyway?

QUESTION: Yes. I am thinking of people like accountants or auditors who might be of assistance and give assistance to the trier of the facts.

MR. SELLERS: I think that the language is very strict. I think it precludes the examiner from consulting with anyone about the case. I think it was intended to be very strict. One could argue that it means consulting with any

one of the two parties, but my own view is that it is very strict language.

QUESTION: Your thought would be then that the examiner, for instance, would have to examine a room-full of records, for instance payroll records, payroll cards, to compute damages?

MR. SELLERS: No.

QUESTION: I had reference to computing the damages from the determining standard and rates of pay in a case involving failure to pay a minimum wage. It would seem to me that it would be the work of an accountant or an auditor, and if a lawyer were to do that, it would seem to me he would be stepping out of his field.

MR. SELLERS: The chances are the counsel for the other party would not want to be present. But it means that he is to be given an opportunity to be present. If the counsel wants to sit down and look over all that evidence, that is his privilege.

THE JUDICIAL REVIEW PROVISIONS OF THE
FEDERAL ADMINISTRATIVE PROCEDURE
ACT (SECTION 10) BACKGROUND
AND EFFECT

JOHN DICKINSON

The Administrative Procedure Act¹ stands at the end of a long history which illumines every part of it; and aside from that history, no provisions of the Act, least of all those having to do with judicial review, can be adequately construed.

I

The sequence of events which resulted in the act reaches back at least to May, 1933, when the Executive Committee of the American Bar Association created its Special Committee on Administrative Law. That Committee came into existence simultaneously with a mass of early so-called "New Deal legislation," such as the National Industrial Recovery Act, the Agricultural Adjustment Act and the Emergency Transportation Act. These laws represented the continuation of a tendency which had already made itself felt during the previous decade in the Packers and Stockyards Act, the Grain Futures Act, the Radio Act and similar statutes which called into play a vast extension of administrative powers.

From 1933 the Bar Association's Special Committee served not only as a continuing agency for observation and criticism, but also as the mainspring of the persistent efforts towards improvement which at last came to fruit in the Administrative Procedure Act.

The successive reports of the Committee are indispensable source-materials for the Act. They began in the early

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¹ Pub. L. No. 404, 79th Cong., 2d Sess. (1946).

years by indicating the points of concern at which the Bar was disturbed by the expansion of administrative power. One of these was the proliferation of quasi-legislative administrative rules, regulations, and executive orders, without adequate provision to bring them to the knowledge of those who were supposed to comply with them. That situation, exposed by the Supreme Court in the Panama Oil case,² was corrected at the instance of a group of Government lawyers headed by Judge Harold Stephens through the enactment of the Federal Register Act of July 26, 1935.³

The problem of surrounding the processes of delegated legislation with procedural safeguards, and making the output of rules and regulations amenable to proper review, has persisted. It has had its part in practically all subsequent proposals for reform and has contributed a Section—Section 4—to the Administrative Procedure Act. Because of limitations of space, nothing will be said here concerning review of quasi-legislative acts. I hazard only a comment that the Act, in grouping together as legislative and providing identical treatment for both rate-fixing orders, which are highly specific in their application, and interpretative regulations, which are mere abstract announcements of prospective policy, may create some difficulties in the future.

The problem of confining administrative action within the bounds of fair procedure and the limits set by law was from the outset felt to be pressing in cases of so-called administrative adjudication or quasi-judicial action—that is to say, cases where an administrative order is brought directly home to a particular applicant or defendant, and where it operates immediately to forbid or require someone to act. Here one of the abuses which it was thought should be corrected was the combination of the functions of prosecutor and judge in the same hands. There was also the

² *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241, 79 L. ed 446 (1935).

³ 45 Stat. 500 (1935), 32 U. S. C. A. § 154.

problem of insuring to the parties adequate opportunity to present their case and a disinterested appraisal of the facts free from political interference or bureaucratic bias. These evils were pointed out in the second annual report of the Special Committee, and the remedy there suggested was more effective judicial review. The Committee's language is as follows:

The evils to which attention has been called, while they would still be present, would at least be mitigated if the decisions of administrative tribunals were subject to effective judicial, or at least independent review. With a handful of exceptions, however, they are not subject to such review.

To be effective, review of an administrative decision must not only be by an independent body (*i.e.*, a body having no interest in the outcome, either as legislator, prosecutor or otherwise) but must extend to the determination of issues of both law and fact. Most of the statutes which provide for judicial review of administrative decisions specifically limit the reviewing court to questions of law. . . . With such a restriction, the right of judicial review becomes, in the great majority of cases, a mere empty shell, particularly when the administrative tribunal (through its attorneys) consciously frames its findings of fact with an eye not so much to the evidence as to justify an *a priori* decision.

What is even more disturbing is the recent tendency to avoid making any provision whatsoever for judicial review, and, so far as possible, to avoid the possibility of such review.⁴

This emphasis on judicial review led, during the debates in the Association, to the usual charge that the Committee wished to transfer the conduct of Government to the courts, and proposed to overburden them with work for which they were not properly fitted.⁵ The Committee subsequently pointed out that effective judicial review does not mean that every administrative decision will be reviewed, or that the courts will take over the work of administration, but only that the possibility of court review remains as a

⁴ (1934) 59 A. B. A. Rep. at 546-547.

⁵ (1934) 59 A. B. A. Rep. 151.

wholesome deterrent to improper administrative action. In the Committee's words,

The ever present knowledge in the minds of the administrative tribunals that their decisions may be challenged in the courts at any time and in any case is a constant spur to these tribunals to attempt to make their decisions square with the facts.⁶

Nevertheless, the disparagement of judicial review, which was dominant in the thirties in conjunction with a general disparagement of the courts, may have influenced the Committee, for in its earliest proposals for legislation, it avoided the problem of judicial review and sought a solution in a somewhat different direction. These proposals, which were embodied in a series of bills associated with the name of Senator Logan of Kentucky, were directed primarily at the evil presented by the union of prosecuting and judicial functions in the same hands. The plan followed by the early Logan proposals was to deal with this problem by withdrawing at least some of the quasi-judicial functions from administrative agencies and lodging them in a separate body to be called "an administrative court." Before this court the different agencies would appear in their executive or prosecutorial capacity in such matters as the revocation of licenses. The need for judicial review would be circumvented by having the original action take place through a judicial body, namely, the administrative court, whose decisions, like those of other courts, would be subject to appeal to the higher courts.

The possibility of thus segregating the quasi-judicial phases of an administrative body's work from its executive phases had an allure at the time to many students of administration and found expression in some of the studies submitted in 1937 with the report of the President's Committee on Administrative Management.⁷ Difficulty emerged

⁶ (1937) 62 A. B. A. Rep. at 843.

⁷ The President's Committee on Administrative Management, Report of the Committee, with Studies of Administrative Management in the Federal Government, Submitted to the President and Congress in accordance with Pub. L. No. 379, 7th Cong., 2d Sess., 1937; see especially Robert E. Cushman, *The Problem of the Independent Regulatory Commissions* (1941) p. 215.

when it was sought to translate the proposal into practice. There was, first of all, the problem of how to disentangle the quasi-judicial functions of an agency from its other functions, and secondly, where to lodge them after they had been so segregated. Many students suggested lodging them in a semi-independent position within the agency itself, and this suggestion, as we shall see, was later to bear fruit. The Logan proposals enhanced the difficulty, not merely by transferring them to a body outside the agency, but by seeking to combine them for a large number of different agencies in a centralized administrative court.

The inherent difficulties of the problem made the proposed administrative court from the beginning a thing of shreds and patches. The plan finally urged was to consolidate in the proposed court only the judicial work of a very small number of agencies, such as the Customs Court and the Board of Tax Appeals, whose tasks were not within the field commonly regarded as administrative regulation. Aside from the jurisdiction which the proposed court would inherit from these bodies, its time was to be absorbed in the single matter of the revocation or suspension of licenses, permits, registrations and certificates. In this field the court was to be given practically all the powers vested in the other departments, commissions and executive agencies of the Government. Among the more important items of jurisdiction over revocations of licenses which it was thus proposed to transfer to the new court, were the jurisdiction of the Secretary of Agriculture to revoke registrations of dealers at stockyards; of the Secretary of Commerce to revoke registrations of aircrafts and pilots; of the Postmaster General to revoke certificates of second-class mail privileges and to revoke mail privileges for fraud; of the Federal Communications Commission to revoke licenses for the operation of radio stations; of the Federal Power Commission to revoke licenses for the construction of dams; of the Securities and Exchange Com-

mission to revoke registrations of securities, and of the Interstate Commerce Commission to revoke certificates for the operations of common carriers.⁸

With this single exception in the matter of the revocation and suspension of licenses, the entire vast mass of important quasi-judicial functions would still remain with the existing agencies where they were already lodged, and as to these the Logan Bills granted no relief whatever by way of improved procedure, judicial or otherwise. At the same time the volume of work proposed to be consolidated into the new administrative court was so enormous that it was thought necessary to man the court with forty judges.⁹

This proposal for an administrative court was elaborated in the Bar Association Committee's report for 1936. At the annual meeting of the Association, some opposition was expressed; and while the Association approved the proposal in principle,¹⁰ the Committee subsequently reconsidered its position after conference with other groups, including the Administrative Law Committee of the Federal Bar Association, of which the present writer at that time happened to be Chairman.¹¹ In the end, the Committee gave up the idea of consolidating quasi-judicial functions from separate administrative bodies into a central administrative court, and in its report for 1937 adopted a wholly new approach, which was embodied in a draft bill submitted with the Special Committee's report for that year.

This bill was the starting point for all subsequent legislative attempts to improve administrative adjudication. Disregarding its first two sections, which dealt with quasi-legislative action, it proposed to establish two types

⁸(1936) 61 A. B. A. Rep. 763.

⁹ For an outline of the Logan Bill in its 1936 version, see (1936) 61 A. B. A. Rep. 760-767. This bill was introduced in the 74th Cong., 2d Sess. (1937) in the Senate as S. 3787 and in the House by Representative Celler as H. R. 12297.

¹⁰(1936) 61 A. B. A. Rep. 233.

¹¹(1939) 64 A. B. A. Rep. 581.

of review for quasi-judicial administrative decisions. First, in Section 3, provision was made for an administrative review by an intra-departmental board of appeal, and, secondly, in Section 4, the bill provided for judicial review of administrative decisions by the courts.

The provisions of Section 3 for administrative review contemplated setting up within each executive department an appeal board, segregated from other functions, and charged with deciding appeals from administrative determinations made within the department. This proposal was the residual survivor of the original theory of segregating in separate hands the judicial, as distinguished from the executive, work of administrative bodies. Under the new bill, this judicial work was not, however, to be handed over to, and consolidated in, an outside "administrative court" but was to be performed at the appellate level by a body within the agency itself, occupying, however, a somewhat detached and aloof position and enjoying a certain degree of independence. While the bill confined the establishment of such appeal tribunals to the executive departments as distinguished from so-called independent commissions, it provided that the latter should conduct hearings at the trial level through an Examiner who should be required to make, and serve upon the parties, a copy of a proposed report, to which they might then file exceptions and argue these in a proceeding of an appellate character before the Commission itself.¹² The substance of some of these provisions still survives in Sections 7 and 8 of the Administrative Procedure Act.

The proposed departmental appeal tribunals, while modeled on existing bodies like the Board of Patent Appeals and the Board of Tax Appeals, which had given general satisfaction, nevertheless encountered strong opposition in the House of Delegates. The grounds of this were that, since such Boards would be appointed by the head of a department from among his own employees, they

¹²(1937) 62 A. B. A. Rep. 848.

would have no real independence and their determinations would be entitled to no reliance. In the words of ex-Governor Slaton of Georgia, ". . . the bill proposes in effect to place in the hands of the Executive Department, which is involved in the controversy, the decision of all questions of fact, and it is the decision of these fact questions which determines ninety-nine out of one hundred cases."¹³ It was accordingly urged that the determination of facts should either be made by tribunals outside of the administrative agency altogether or that provision should be made for a more adequate and a fuller judicial review than was provided by Section 4 of the bill.

The review provisions of Section 4 were universally applicable to all quasi-judicial decisions of all federal administrative bodies, and placed at the disposal of every person aggrieved by such a decision a uniform procedure for judicial review. This was by way of an appeal, on the record made before the administrative agency, to the Circuit Court of Appeals for the Circuit within whose jurisdiction the appellant resided or had his principal place of business. The court was authorized to set aside an administrative order on any one of five grounds, namely, if it were shown that the order was (1) unsupported by evidence, or (2) issued without due notice and reasonable opportunity to be heard, or (3) based on arbitrary and capricious findings of fact, or (4) beyond the jurisdiction of the agency, or (5) in violation of the Constitution or statutes of the United States.¹⁴ The House of Delegates approved the bill in principle¹⁵ but the views expressed during the debate in favor of fuller, simpler and more uniform judicial review, particularly on questions of fact, seem to have found response in the tone of the Committee's next report, which was the work of Dean Pound as Chair-

¹³ (1937) 62 A. B. A. Rep. 272.

¹⁴ (1937) 62 A. B. A. Rep. 849.

¹⁵ For debates and House of Delegates action, see (1937) 62 A. B. A. Rep. 262-290.

man. It was in this report that the following language of Chief Justice Hughes was quoted:

An unscrupulous administrator might be tempted to say 'let me find the facts for the people of my country and I care little who lays down the general principles.'¹⁶

With this report the Committee submitted a slightly modified form of the same bill which had accompanied its report of the year before. The language of Section 4, dealing with the scope of review, was definitely broadened in two particulars with respect to judicial review of the facts. First, the phrase of the earlier bill "unsupported by evidence" was changed to read "not supported by substantial evidence," and secondly, there was included a new ground for reversing a fact determination by an agency, namely, that "the findings are clearly erroneous."¹⁷ These changes were undoubtedly intended to broaden the scope of judicial review of the facts in the light of the dissatisfaction with the earlier bill expressed during the debate in the House of Delegates. A bill closely corresponding to this Bar Association draft of 1938, with a few relatively unimportant modifications, was introduced in the Senate by Senator Logan and in the House by Congressman Walter early in 1939, and became the so-called Walter-Logan Bill.¹⁸

In the Committee's annotations of the bill accompanying its 1939 report there is an interesting discussion of the provisions of Section 4 which authorize reversal by the reviewing court where the administrative findings of fact are "clearly erroneous" or "not supported by substantial evidence." The report characterizes such court review of the facts as only "permissive," and then goes on to say:

¹⁶(1938) 63 A. B. A. Rep. 338, referring to New York Times, Feb. 13, 1931, quoted in Vanderbilt, "The Place of the Administrative Tribunal in Our Legal System," (1938) 24 A. B. A. J. at 267, 269.

¹⁷(1938) 63 A. B. A. Rep. at 367, lines 41 and 40 respectively.

¹⁸(1939) 64 A. B. A. Rep. 281. In the Senate the bill was S. 915, 76th Cong., 2d Sess. (1939) and the House bill was H. R. 6324. Congressman Celler actually introduced the Bar Association Bill in the House as H. R. 4236, but this bill was superseded by Walter's introduction of H. R. 6324.

It has not been intended that the reviewing court shall review the evidence in any case unless and until counsel for the aggrieved parties shows to the court that such action is necessary to prevent wrong, fraud or injustice being done. The scope of permissive review of the record evidence in a trial before an administrative agency should be broader than the scope of such review of either the verdict of a jury or the findings of a trial court. While the administrative agency should be, and generally is an expert trier of facts—and weight thereto should be given accordingly—nevertheless the administrative officers do not have that degree of detachment from the issue or the parties or necessarily absence of bias that a jury or a trial judge is supposed to have.¹⁹

The report states that the phrase “clearly erroneous” in the review formula was taken from the new Supreme Court rule 52 with respect to the weight to be given to the findings of fact of a trial judge sitting without a jury, and that the phrase “substantial evidence” was intended to be used in the sense then recently defined by the Supreme Court in its decision in the Consolidated Edison case on December 5, 1938, where the Court had said:

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . In saying that the record was not “wholly barren of evidence” to sustain the finding . . . we think that the court referred to substantial evidence . . . this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force.²⁰

¹⁹ (1939) 64 A. B. A. Rep. at 613.

²⁰ Consolidated Edison Co. of New York, Inc., v. National Labor Relations Board, 305 U. S. 197, 59 Sup. Ct. 206, 217, 83 L. ed. 126 (1938); (1939) 64 A. B. A. Rep. 612-613.

The “substantial evidence” formula for determining the scope of judicial review of administrative determinations of fact was recommended in 1939 by the Association's Committee on Administrative Agencies and Tribunals of the Section of Judicial Administration, in proposing a uniform State Administrative Procedure Act. The latter Committee in its report used the following language:

“As to the exact statutory language that should be used to define the review that we have concluded to be desirable, we have found no form of expression which appears more suitable than the one suggested by the Special Committee

The Walter-Logan Bill was passed by the House of Representatives on April 18, 1940,²¹ after a miscellaneous list of agencies had been expressly exempted from its provisions by name, and after a debate in which the breadth of its review provisions was criticized. Thus in the debate, Congressman Rankin of Mississippi objected to the "clearly erroneous" formula as follows:

Mr. Chairman, this is the provision that would authorize the court to set aside a ruling of one of these boards if the court determined that the findings of fact were clearly erroneous. In other words, you transfer the physical operations of one of these boards to the courts. That is one step further in court government than I believe you want to go.²²

The phrase, however, was allowed to remain in the bill as passed by the House, but was deleted by the Senate Committee with the following explanation from Senator King:

As the bill was originally drafted and as it passed the House recently, it provided that an order might be set aside if the findings of fact were clearly erroneous. This language was criticized on the ground that it would permit courts to review the evidence and substitute their own independent views of the facts for the findings reached by the bureau. To meet this criticism the Committee on the Judiciary of the Senate has stricken the quoted words

on Administrative Law in its proposed bill: that the finding of fact should be sustained unless clearly erroneous or unsupported by substantial evidence. Using 'substantial evidence' as the Supreme Court of the United States has recently defined it—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"—and adding the term 'clearly erroneous' by way of authorizing the court to go somewhat beyond the mere search for substantial evidence and to correct flagrant error wherever found, we believe that the suggested expression confers all the authority that the courts can reasonably be expected to accept, while at the same time empowering them to do what is necessary to avert serious miscarriages of justice With such a statutory authorization as we are here proposing, the court will have ample power to correct the injustices which are serious enough to impress the judicial conscience with the need for relief, yet the courts will not be turned into super-administrators or required to step out of their proper judicial role."

((1939) 64 A. B. A. Rep. 417-418.)

²¹ 86 Cong. Rec. at 4743 (Apr. 18, 1940).

²² 86 Cong. Rec. at 4670 (Apr. 17, 1940).

from the bill, for those sponsoring this legislation recognize that the administrative agencies are the primary fact-finding bodies.²³

Although the bill as finally passed lacked the offending phrase, Attorney General Jackson, in his letter advising a veto by the President, criticised its review provisions as unduly broad, on the ground that they would extend review to "all manner of questions which have never before been considered appropriate for judicial review." He also charged that the bill was too inflexible in providing a uniform review procedure for administrative decisions generally, and that the scope of fact review, although made only permissive and limited to the familiar "substantial evidence" formula, was nevertheless so broad as to transfer to the courts much of the discretion proper to be exercised by executive agencies.²⁴ Translating these objections into popular language the President in his veto message said:

The bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation.²⁵

Meanwhile, on February 24, 1939, shortly after the original introduction of the Walter-Logan Bill, there had been appointed by Attorney General Murphy, at the suggestion of the President, the so-called Acheson Committee, or Attorney General's Committee on Administrative Procedure, charged with the duty to investigate the need for procedural reform in the field of administrative law.²⁶ This Committee reported on January 22, 1941, a month after the President's veto of the Walter-Logan Bill. The

²³ 86 Cong. Rec. at 13676 (Nov. 19, 1940).

²⁴ 86 Cong. Rec. 13943, 13945 (Dec. 18, 1940).

²⁵ 86 Cong. Rec. at 13943 (Dec. 18, 1940).

²⁶ See page 1 of the report of the Committee on Administrative Procedure, printed in Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941), entitled "Administrative Procedure in Government Agencies." This document is hereinafter cited REPORT.

report was accompanied by two draft bills, one representing the views of the majority and the other those of the minority, of the Committee.

The majority bill contained no important provisions on the subject of judicial review, but relied on the device of administrative appeal within the agency or department. Its proposals in this respect were but an elaboration of Section 3 of the original Bar Association Bill of 1937. They contemplated a separation between the trial procedure and the appellate procedure within the agency.²⁷ The trial procedure was to be before a hearing commissioner, whose independence from agency influence was supposed to be safeguarded by an elaborate set of statutory provisions, while the administrative appeal was to be heard by the heads of the agency itself. This was a novel reversal of previously discussed plans for having the administrative appeal lie to a tribunal relatively independent of the agency, like the Board of Tax or Patent Appeals.

The minority of the Attorney General's Committee were of the opinion that the majority recommendations with respect to the independence of hearing commissioners were not sufficiently adequate to dispense with the necessity for more effective judicial review. They suggested that the proposed independence might turn out to be merely formal and colorable, and, while accordingly accepting some of the majority proposals for improvements in procedure within the administrative agency, the minority felt it necessary to go farther and provide for more adequate judicial review, including a somewhat fuller and broader judicial review on questions of fact that was in many instances accorded under existing laws. In this connection they pointed out in their report the danger of relying too entirely or confidently on the so-called "substantial evidence formula":

The present scope of judicial review is also subject to question in view of one of the prevalent interpretations of the 'substantial

²⁷ REPORT, 196-201.

evidence' rule set forth as a measure of judicial review in many important statutes. Under this interpretation, if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the counter-vailing evidence may preponderate. . . . Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored. The courts, of course, should not weigh meticulously every bit of evidence. Indeed, such a requirement would prove a very undesirable burden. But the courts should set aside decisions clearly contrary to the manifest weight of the evidence. Otherwise, important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error.²⁸

To remedy this defect in the "substantial evidence formula," the minority, in the draft bill which they annexed to their report, provided that the reviewing court should consider and decide whether the administrative findings, inferences, or conclusions of fact were unsupported upon the whole record by substantial evidence. This introduction into the "substantial evidence formula" of the words "upon the whole record," of which no earlier suggestion has been found than the minority report of the Attorney General's Committee,²⁹ may well be thought to represent the most original, helpful and significant contribution yet

²⁸ REPORT at 210-211.

²⁹ My friend, Mr. Robert M. Benjamin, has very kindly called my attention to the fact that an interpretation of the "substantial evidence rule" which in effect amounts to the "substantial on the whole record" requirement was applied by the New York Court of Appeals in the *Stork Restaurant* case (*Matter of Stork Restaurant, Inc., v. Boland*, 282 N. Y. 256, 26 N. E. (2d) 247 (1940)), where the court said:

"The evidence produced by one party must be considered in connection with the evidence produced by other parties. Evidence which, unexplained, might be conclusive, may lose all probative force when supplemented and explained by other testimony. The Board must consider and sift all the evidence."

Thus, according to this form of the substantial evidence test, the reviewing court must "take into account all the evidence on both sides." See "Administrative Adjudication in the State of New York," Report to Honorable Herbert H. Lehman, by Robert M. Benjamin, Commissioner, under § 8 of the Executive Law, 1942 at 329.

made to the solution of the difficult problem of judicial review of administrative fact-determinations.

The necessity for such clarification of the substantial evidence formula in spite of the Supreme Court's decision in the Consolidated Edison case referred to above³⁰ was emphasized by Dean Stason at the Senate Committee hearings on the majority and minority bills. Dean Stason's language is as follows:

Construed grammatically, the term 'substantial evidence' might conceivably, although not reasonably, mean little more than a sort of modified scintilla rule. . . . So defined, the requirement simply calls for a searching of the record to find some relevant testimony which can be regarded as substantial to support the order, ignoring all countervailing testimony introduced by the opposing party. There are decisions apparently adopting this modified scintilla method of applying the substantial evidence rule. In fact, in two recent Supreme Court decisions in Labor Board cases, the National Labor Relations Board v. Waterman Steamship Corporation, 309 U. S. 206, and National Labor Relations Board v. Bradford Dyeing Association, 310 U. S. 318, this scintilla technique seems to have been followed, at least so far as the method is revealed by the written opinion of the court. . . . In the Bradford Dyeing Assn. case another interesting deviation from good practice appears. The Court seemingly declined altogether to review the inferences drawn from the facts by the Labor Board. Instead the Court regarded the judicial power of review as exhausted in determining whether or not the underlying or evidentiary facts were supported by substantial evidence. This construction of the substantial evidence rule, barring the courts from reviewing the inferences drawn from the underlying facts, virtually precludes judicial reversal of fact decisions, even though erroneous.³¹

This serves to explain the inclusion in the minority bill of specific reference to "inferences or conclusions of fact," as well as the requirement that "substantial evidence"

³⁰ See note 20 *supra*.

³¹ "Administrative Procedure": Hearings Before a Subcommittee of the Senate Judiciary Committee on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess. (1941) at 1355-1356.

shall mean evidence that is "substantial upon the whole record."

The word "inference" has not been carried over into the Administrative Procedure Act, but the reference to "conclusions," as well as to "findings," has survived in Section 10 of the Act, as has the requirement that the court in making its determinations shall review the whole record.

In other respects, the bill submitted by the minority attempted to meet the objections which had been urged against comparable provisions of the Walter-Logan Bill. One of these, as noted above, was that the latter apparently made review available for every kind of administrative decision. This possibly undue breadth of application the minority sought to cure by limiting the review provisions of their bill to so-called "reviewable orders" and by providing a statutory definition of those.³² This provision was undoubtedly intended to meet Attorney General Jackson's objection that the Walter-Logan Bill swept into "the judicial hopper all manner of questions which have never before been considered appropriate for judicial review."³³

With this summary of the recommendations of the Acheson Committee minority, the chapter of origins of the judicial review provisions of the Administrative Procedure Act may well be closed. The writer's research may have been incomplete, but he has had no other or subsequent developments brought to his attention, down to the enactment of the Act, which shed additional significant light on any of its review provisions. Against the background that has been sketched, the meaning and scope of those provisions may now be approached by way of two questions:

(1) To what decisions or orders made in the course of administrative adjudication, do the provisions for judicial review contained in the Act of 1946 apply, and do they

³² REPORT, 246.

³³ *Ibid.* at 245.

have the effect of allowing review of any administrative acts not previously reviewable?

(2) Do the provisions of the Act of 1946 have the effect of broadening the scope of the judicial review available for administrative decisions which were reviewable prior to the enactment of the Act?

II

In answering the first of the two foregoing questions, it is to be noted that the language of the Act operates by a process of inclusion and exclusion.

First, the Act takes up and incorporates into itself, and makes its provisions applicable to, all existing instances of review authorized specifically by special statutes. This appears from the first clause of the first sentence of paragraph (c) of Section 10 which reads, "Every agency action made reviewable by statute . . . shall be subject to judicial review." It follows also from the first clause of the first sentence of the preceding paragraph (b) which reads, "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter. . . ." It thus appears that the new Act reaffirms, and makes its own provisions applicable to, all instances where judicial review is presently available by virtue of a special statute.

Secondly, and on the other hand, the Act by the first numbered subdivision of the leading paragraph of Section 10 expressly excludes review in those cases where "statutes preclude judicial review."

The effect of the provisions just cited, when read together, is to affirm judicial review where statutes expressly confer it, and to exclude it where statutes "preclude" it. Does this mean that under the new Act the availability of review proceeds entirely from the special statute or statutes governing review of the agency whose decision is in question, and that the opportunity of review exists only where such statutes grant it? The answer to this question

clearly must be in the negative, since the Act does not say that review is excluded wherever the statute does not grant it,—it says only that review is excluded where the statute “precludes” it. There is thus plainly intended to be an intermediate zone of reviewable cases where the statute, without expressly granting review, does not “preclude” it; and this construction is confirmed by reference to the second clause of the first sentence of paragraph (c), which creates an additional category of reviewable cases besides those where the administrative act is made reviewable by statute. This additional category of reviewable acts, as stated in the words of the second clause of the first sentence of paragraph (c), includes “every final agency action for which there is no other adequate remedy in any court,” in addition to the first category, which comprises “every agency action made reviewable by statute.”

There would be no rational place for this second category of reviewable cases if review should be held to be “precluded” by statute in all instances where not conferred by statute. Accordingly, to apply the well-known rule of construction which gives effect, if rationally possible, to every provision of a statute, there must exist a category of final agency acts not specifically made reviewable by special statute, but made reviewable by the second clause of the first sentence of paragraph (c) of Section 10.

This construction is also confirmed by the breadth of language used in paragraph (a) of Section 10, to the effect that “Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.” Reading these words in conjunction with the second clause of the first sentence of paragraph (c), the conclusion seems required that the new Act, by its own terms, gives a right of review, independently of the right conferred by special statutes, in cases where a person has suffered a wrong of which he is legally entitled to complain, or has been adversely

affected or aggrieved, by a final administrative decision "for which there is no other adequate remedy in any court." The intention to produce such a result seems further clearly shown by the first sentence of paragraph (b), which, after providing for review in the form of any special procedure made available by statute, goes on to add that "in the absence or inadequacy" of statutory procedure judicial review is authorized by "any applicable form of legal action." This also clearly contemplates judicial review "in the absence" of a special statutory procedure, which would be meaningless if the new Act was to be construed as only authorizing review where already made available by statute.

The substance of these conclusions is the broad one that the Act means to extend an opportunity for review, irrespective of special review procedures provided by statute, to final administrative acts, "for which there is no other adequate remedy in any court," and by which a person has suffered a legal wrong, or been adversely affected or aggrieved. The question which next arises is whether the Act means to extend review to all such final administrative acts. Or does the broad opportunity for review which is thus apparently promised, become illusory in the light of a closer inspection of other statutory language?

In this connection attention must be given to four clauses which constitute restrictions or limitations upon the existence of a right of review flowing directly from the new Act independently of special statutes. These limitations are that, for a right of review to be conferred by the Act, first, the statute under which the administrative action is taken must not "preclude judicial review"; second, the agency action must not be "committed by law to agency discretion"; third, there must be an "applicable" form of review proceeding available and, fourth, the administrative action sought to be reviewed must be one "for which there is no other adequate remedy in any court." Each of these limitations will be considered in turn.

First. The statute under which the administrative action is taken must not "preclude" judicial review. It was clearly the intention of Congress to require by this language something more than mere absence from the statute of express provision for review. By the word "preclude," Congress intended that the statute must actively negative the existence of a right of review, rather than merely fail to confer such a right. This appears from the following language of the House Committee's report on the bill:

To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.³⁴

The following colloquy occurred in the Senate:

Mr. Austin: Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for review?

Mr. McCarran: That is correct.

Mr. Austin: And is it not also true that because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer legal wrong or wrongs of the other categories mentioned?

Mr. McCarran: That is true; the Senator is entirely correct in his statement.³⁵

Even, however, if it is thus clear that judicial review is not "precluded" merely because not expressly granted by statute, the quotation given above from the House Committee discloses that a statute may be construed by "clear and convincing evidence" as withholding or "precluding" review even if it does not do so expressly. The result is

³⁴ See p. 275 of Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) entitled "Administrative Procedure Act, Legislative History." This document is herein after cited Legislative History.

³⁵ 92 Cong. Rec. at 2195 (Mar. 12, 1946).

that the provision of the Administrative Procedure Act now under discussion leaves to the discretion of the courts, and ultimately of the Supreme Court, the question of whether or not as a matter of statutory interpretation a statute which does not grant the right of judicial review is to be construed as "precluding" it.

This is a power which the courts have been exercising in ample measure in connection with much of the loosely drawn legislation of recent years. Some of the results are available in well-known decisions. Thus in *Stark v. Wickard*,³⁶ the Supreme Court had before it the question of the reviewability of a marketing order issued under a Section of the Agricultural Marketing Agreement Act which contained no express provision for judicial review. The Court held, with two justices dissenting, that the Act bore on its face the intent to submit many questions arising under its administration to judicial review; that with this recognition by Congress of the applicability of judicial review in this field, it was not to be assumed that the silence of the statute necessarily excluded the jurisdiction of the courts upon an otherwise justiciable issue; and that, accordingly, a group of persons claiming to be injured by the order were entitled to a review of it in injunction proceedings. On the other hand in the *Switchmen's Union* case,³⁷ the Court held that determinations of the National Mediation Board as to the right of a union to be the authorized representative of a group of employees under the Railway Labor Act is not subject to judicial review, not only because the right to review this particular class of determinations is omitted from the statute while review is provided for certain other types, but also because, where Congress has not expressly authorized judicial review, the nature of the problem involved and the appropriateness of review thereto are relevant in determining whether review may be supplied by implication.

³⁶ 321 U. S. 288, 64 Sup. Ct. 559, 88 L. ed. 733 (1944).

³⁷ *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 64 Sup. Ct. 95, 88 L. ed. 61 (1943).

It would seem to follow that under Section 10 of the Administrative Procedure Act the discretion of the courts to place divergent interpretations of this kind upon the silence of Congress with respect to judicial review is perpetuated, and that in this respect, as in others, what the statute does is not to give a clear mandate to the courts, but in effect to authorize them to exercise their reviewing power if in their judgment the statute under which the administrative act was taken does not forbid it. However, if any weight is to be given to the language quoted above from the House Committee Report, it would seem that the Act should have at least the effect of instructing the court that in the exercise of this discretion there must be "clear and convincing evidence" on the part of Congress to justify a decision that the legislative silence is to be construed as evidencing intent to withhold opportunity for review.

Second. The second limitation or qualification which the Administrative Procedure Act interposes to the existence of a right of review where not specifically conferred by statute is that the administrative act involved must not be "committee by law to agency discretion."³⁸

This language, standing alone, might be construed to exclude most forms of administrative action from the review accorded by the act, since to some degree almost all administrative action is "committed to agency discretion." However, that some discretionary acts are intended to be made reviewable seems clear from the provision of Subsection (c) which authorizes the reviewing court to set aside an administrative act found to constitute an "abuse of discretion." Clearly there could be no "abuse of discretion" unless the act under review were to some extent discretionary. The Congressional reports and proceedings supply some indication of what Congress probably intended in making the review provisions of the Act inapplicable to administrative acts which are "by law committed to

³⁸ Legislative History at 413.

discretion." In the first place, the intention is apparently to exclude from review altogether those cases where the discretion conferred on the agency is what has sometimes been called by the courts an "absolute" or "unfettered" discretion. This is apparently the meaning of the following statement by Senator McCarran:

Committed 'by law' means, of course, that [the] claimed discretion must have been intentionally given to the agency by the Congress, rather than assumed by it in the absence of express statement of law to the contrary. 'Abuse of discretion' is expressly made reviewable.³⁹

Secondly, the provision is intended to mean that insofar as an agency in administering a statute is expected, within the limits prescribed by the statute, to use its discretion in arriving at its determinations, such discretion is not reviewable. This is indicated by the following language in the House Committee Report:

Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act, but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein.⁴⁰

It seems to follow that the review provisions of the new Act operate, on the one hand, where they are available at all, to restrict the scope of review in reviewable cases by excluding those issues which are peculiarly committed to the discretion of the administrative body; and at the same time exclude the possibility of review altogether,

³⁹ McCarran address to American Bar Association, reprinted in 93 Cong. Rec. at A111, A113.

⁴⁰ Legislative History at 275.

and create non-reviewable situations, wherever the action sought to be reviewed is of the type which the courts regard as falling within the "absolute" or "unfettered" discretion of the agency, at least so long as that discretion is not abused by arbitrary or capricious action.⁴¹

There are many illustrations of such unfettered administrative discretion, particularly under statutes dealing with the public lands, with Government contracts, Government oil leases, and the like. Thus, for example, in such a case as *United States v. Ickes*, 101 Fed. (2d) 248 (U. S. C. A. D. C., 1938), the Court of Appeals for the District of Columbia in an opinion by Judge Vinson held that it was a matter of pure discretion with the Secretary of the Interior as to whether he would or would not execute an oil and gas prospecting lease on public land, and that since the statute imposed on him no duty to execute the lease, his action could not be controlled by the courts through mandamus or otherwise. The same result was reached likewise in an opinion by Judge Vinson, in *Doehler Metal Furniture Co., Inc. v. Warren*, 129 Fed. (2d) 43 (U. S. C. A. D. C., 1942), where it was held that the Comptroller General's exercise of his function in making calculations of amounts due by the Government is an exercise of discretion which is immune from control by the courts through the declaratory judgment procedure no less than through mandamus proceedings.

Something approximating this doctrine of absolute discretion has long been present in cases involving the grant-

⁴¹ But see *Order of Railway Conductors of America v. National Mediation Board*, 141 F. (2d) 366 (U. S. C. A. D. C., 1944) decided on the authority of the *Switchmen's Union* case), where in its *per curiam* opinion the Court of Appeals for the District of Columbia said (p. 367) that the Supreme Court, in *Brotherhood of Railway and S. S. Clerks, etc., v. United Transport Service Employees*, 320 U. S. 715, 64 Sup. Ct. 260, 83 L. ed. 420 (1943), "went further and extended the prohibition against judicial review to cases in which the action of the Board was said to be clearly arbitrary." The Supreme Court's opinion in the *United Transport* case was also *per curiam*, reversing, with one sentence, a decision of Court of Appeals for the District of Columbia holding invalid an order of the National Mediation Board; see 137 F. (2d) 817 (U. S. C. A. D. C., 1943). Writ of certiorari was dismissed in the *Railway Conductors* case, 323 U. S. 166, 65 Sup. Ct. 222, 89 L. ed. 154 (1944).

ing of licenses,⁴² and while sharply restricted by some of the later decisions,⁴³ has recently made itself felt in opinions of the United States Supreme Court. Reference in this connection may be made to the Court's decision in *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U. S. 134, 60 Sup. Ct. 437, 84 L. ed. 656 (1939), where the Court held that the Federal Communications Commission, in determining whether or not to issue a license, is exercising discretion in conformity with its own conceptions of the standard of public convenience, and even though it may have committed error of law in a prior determination against an applicant, this gives the courts no power to correct that error in such a way as to prefer the aggrieved applicant to others who may have become applicants later. In the language of the opinion, ". . . an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge."⁴⁴

The Pottsville case was an application for mandamus, and it is in the mandamus cases, of course, that emphasis has been traditionally placed on the complete immunity of administrative discretion from judicial control. It is in these cases that the doctrine of judicial non-interference with administrative action has mainly developed, spreading subsequently to injunction cases and others where the agency could claim that it had a right of unfettered discretionary choice between alternative courses of action.

The doctrine of the cases just reviewed seems to be confirmed by, and incorporated into, that provision of the Administrative Procedure Act which excludes review of "agency action by law committed to agency discretion." Under these words the kinds of administrative acts which

⁴² *Kansas v. Sherow*, 87 Kansas 235, 123, p. 866 (1912); *Lloyd v. Ramsey*, 192 Iowa 103, 138 N. W. 333 (1921).

⁴³ *Elite Dairy Products v. Ten Eyek*, 271 N. Y. 488, 3 N. E. (2d) 606 (1934).

⁴⁴ 309 U. S. 134, 145, 60 Sup. Ct. 437, 442, 84 L. ed. 656 (1939).

have been held non-reviewable because involving discretion will almost certainly be held to remain non-reviewable under the Act. This conclusion would also seem to be required in many instances by the next, or third, restriction which the Act attaches to the existence of a right of review not conferred by special statute.

Third. This third restriction on non-statutory review conferred by the Act is that such review must be by an "applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." Here the key-word is "applicable." Under the Act an aggrieved person who is not provided with a special statutory review procedure must obtain review, if at all, through a form of legal action which is "applicable." When is a form of legal action "applicable" to review an administrative act? Only, it would seem, when it has already been so held by the courts. These considerations have special relevancy in connection with the availability of mandatory relief. The Administrative Procedure Act, as appears from the language just quoted, refers specifically to mandatory injunctions, as well as to actions for declaratory judgments. However, the insertion of the word "applicable" in the statute would seem to have the effect of restraining the use of these forms of relief to cases where they have already been allowed by the courts, and of denying them in cases where the courts have denied them. Thus through its use of the word, "applicable," the new Act would appear to confirm and ratify the decisions in such cases as *United States v. Ickes and Doehler Furniture Co. v. Warren* above referred to.

By the use of the word "applicable," the statute would also seem decisive on the availability of certiorari to federal administrative bodies. In this connection the following colloquy occurred during the discussion of the bill in the Senate:⁴⁵

⁴⁵ 92 Cong. Rec. 2200-2201 (Mar. 13, 1946).

Mr. Austin: In the event there is no statutory method now in effect for review of a decision of an agency, does the distinguished author of the bill contemplate that by the language he has chosen he has given the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, *quo warranto* and so forth?

Mr. McCarran: My answer is in the affirmative. That is true.

Mr. Austin: And does he contemplate that even where there is no statute authority for *certiorari* a party might bring *certiorari* against one of these agencies?

Mr. McCarran: Unless the basic statute prohibits it.

Senator McCarran, in thus stating that under the Administrative Procedure Act *certiorari* would become available to review federal administrative action, was clearly wrong, since under the decisions *certiorari* is not an "applicable form of legal action" to review such determinations. This is the result of the leading case, *Degge v. Hitchcock*, 229 U. S. 162, 33 Sup. Ct. 639, 57 L. ed. 1135 (1913), where the Supreme Court held, as I have always thought wrongly, that the "judicial action" to which *certiorari* is confined as a review procedure must be action which is "judicial" by the full standards of Article 3 of the Constitution, and not merely judicial in the broad sense of requiring an exercise of judicial judgment after notice, hearing and the consideration of evidence and argument. However, *Degge v. Hitchcock* is still law, and its result seems to be clearly taken up and incorporated in the new Act by the words "applicable form of legal action."

One other important consequence of the use of the word "applicable" in the connection just considered is its effect on what was undoubtedly intended to be an important provision of paragraph (e) of Section 10. This provides that "... the reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." Necessarily the relief sought to be made available by this provision is dependent on whether or not a form of action

is provided by which such relief may be availed of. This throws the problem back into paragraph (b) of Section 10, and under paragraph (b) the form of action provided is either the review procedure provided by a special statute, or an "applicable form of legal action." If resort must be had to the latter alternative, then the word "applicable" surrounds the relief available under the Administrative Procedure Act with all the limitations that the courts have imposed upon mandamus and declaratory judgments, with the result that in any particular case it may well prove impossible to give effect to the intent of paragraph (e) that the reviewing court shall "compel agency action unlawfully withheld."

Fourth. The fourth qualification which the Administrative Procedure Act imposes on the existence of the right of review where not granted by a special statute, is that there must be "no other adequate remedy in any court" (paragraph (c) of Section 10). These words raise interesting questions. What is meant by another "adequate remedy in any court?" One would naturally suppose that the words refer to the existence of an available alternative statutory review procedure. This inference, however, is excluded by the fact that cases where statutory review procedure exists have already been taken care of by the first clause of the sentence, which includes "every agency action made reviewable by statute." Therefore, the "other adequate remedy in any court," which is to exclude the nonstatutory review given by paragraph (c), must, it would seem, refer to some available form of proceeding, statutory or nonstatutory, by which adequate redress could be obtained against the allegedly improper administrative act by some method other than direct statutory review. It is not easy to conceive in advance what form such a right of collateral attack would have to take in order to provide "an adequate remedy" as required by paragraph (c).

It is of course a well-recognized common law rule that where adequate direct review procedure is not available,

an aggrieved individual will be entitled in many instances to a form of action in which he can attack an administrative determination collaterally, and obtain in such collateral proceeding his day in court, with the right to present evidence and argument from which he would otherwise be precluded by the absence of adequate review. A leading case of this kind was the well-known case of *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100 (1891).

Does the Administrative Procedure Act mean that where no statutory review procedure is provided, but there exists such a common law right, or constitutional right, to collateral attack through an action for damages or the like, no nonstatutory review will be made available by the second clause of the first sentence of paragraph (c)? In other words, is the existence or nonexistence of nonstatutory review under paragraph (c) made to depend on the availability or nonavailability of a common law form of collateral attack? That this question may be not entirely academic is shown by the recent decision of the Supreme Court in *Estep v. United States*, 327 U. S. 114, 66 Sup. Ct. 423, 90 L. ed. 405 (1946). The Court there held that where Congress had not in the statute expressly granted judicial review of the classification of a registrant by a draft board, the aggrieved registrant was entitled to attack the draft board's decision on this point collaterally by way of defense to a criminal prosecution against him for refusing to submit to induction.⁴⁶

The provision of the Administrative Procedure Act now under consideration raises the interesting question as to

⁴⁶ Two terms before, the Court had decided a case which gave rise to considerable difference of opinion in the *Estep* case and which in principle might seem to be at variance with the later decision. This was *Falbo v. United States*, 320 U. S. 549, 64 Sup. Ct. 346, 38 L. ed. 305 (1944), where a registrant sought to attack a draft board classification order by way of defense to a criminal prosecution for failure to report for induction. The Court held that he could not do so, and Justice Black, writing the majority opinion, observed that Congress had vested classification of registrants in the "complete discretion" of local boards, that even if there were a constitutional right to review, such right could not be relied upon by a registrant prior to his "final acceptance" for service, and that the legislative history of the Selective Service Act was

whether the right recognized by the Court in the *Estep* case to attack an administrative determination collaterally constitutes such an "other adequate remedy in court" as will exclude the nonstatutory review provided by paragraph (c); or whether, on the other hand, if the Administrative Procedure Act had been in force when the *Estep* case arose, the registrant would have been entitled in the first instance, under paragraphs (a) and (b) of Section 10, to a nonstatutory proceeding for direct review of the draft board's action, thus making collateral attack unnecessary. The answer to this question might well depend on the court's opinion whether the remedy which it allowed in the *Estep* case is "adequate"; and also upon whether under paragraph (b) of the new Act it would hold a declaratory

no support for a view "which would allow litigious interruption" of the authorized "process of selection." Justice Rutledge concurred on the ground that *Falbo* had not attacked the appeal board's affirmation of the local board classification. Justice Murphy was the sole dissenter.

In the Court's opinion in the *Estep* case, Justice Douglas distinguished the *Falbo* case on the ground that *Falbo* had not "exhausted his administrative remedies," whereas *Estep* had reported for induction, been finally accepted, but refused to submit to induction. In the latter situation, no reason was seen for denying collateral attack on jurisdictional grounds, since, immediately after induction, release could be secured by habeas corpus. Justice Murphy concurred specially. Justice Rutledge separately expressed the view that Congress had no power to punish without affording some prior opportunity for attack upon the violated order as constitutionally valid.

Justice Frankfurter concurred on the ground that *Estep* should have been permitted to prove his allegation that the local board had denied him the right to appeal to the appeal board, which was thought to mean, if true, that "his obligation of obedience has not yet matured." Frankfurter went on, however, to state extensively his disagreement with the majority's views. He pointed out that in making Selective Service board decisions "final," Congress had added no qualifications suggesting that the availability of judicial review of classification orders was enlarged or otherwise affected by the stage at which the registrant "flouts the Selective Service process." It was further observed that the *Falbo* case had "practically silenced" whatever doubts there had been as to the non-reviewability in a criminal proceeding of board orders, and that eight circuit courts of appeal had denied such review even where the registrant had submitted to the pre-induction physical examination. Chief Justice Stone and Justice Burton, both dissenting, agreed with Frankfurter as to the right of collateral attack, but thought he was wrong in finding other grounds for the reversal of the lower court.

Such divergent views as to the availability of indirect review graphically illustrate the series of troublesome uncertainties lurking in the language chosen by the framers of the Administrative Procedure Act to make judicial review available.

judgment or other direct review proceeding to be an "applicable" form of action for review in such a case when Congress is silent with respect to the right of review.

The answer to questions of this kind would seem to turn on a balancing by the court of considerations inherent in three different clauses of the Act, namely, the "other adequate remedy" clause of paragraph (c), the "applicable form of legal action" clause of paragraph (b) and the clause of the leading paragraph of Section 10 referring to statutes which "preclude judicial review." In the twilight zone between these three clauses, it is almost certain that the Administrative Procedure Act will be construed as remitting the courts to the principles and precedents which they have always followed in the past, and that, to this extent, it will be held that the new Act does nothing to extend a right of review to cases where such review is not now available, either for want of appropriate procedure or otherwise.

This seems in substance the answer which must be given to the first question propounded at an earlier point in this paper—the question, namely, whether the Administrative Procedure Act has the effect of allowing review of administrative determinations not previously reviewable. To this question it would seem that the answer must be mainly in the negative, with possibly a minor exception. This exception, which was pointed out in the Attorney General's interpretation, results from the last sentence of paragraph (c), which deals with the question of what administrative action shall be treated as final for the purpose of review. In the words of the Attorney General:

The doctrine of exhaustion of administrative remedies with respect to finality of agency action is intended to be applicable only (1) where expressly required by statute . . . or (2) where the agency's rules require that decisions by subordinate officers must be appealed to superior agency authority before the decision may be regarded as final for purposes of judicial review.⁴⁷

⁴⁷ 92 Cong. Rec. at A3151.

What this sentence of paragraph (c), so interpreted, would apparently mean is that, after an administrative determination has been made, a judicial review may be sought without applying to the agency for rehearing or reconsideration, or without taking an appeal within the agency, unless a statute or the agency's own rules require otherwise.⁴⁸

The conclusion which follows from the foregoing discussion is that, with the minor exception just noted the new Act in all likelihood will not be construed to create any new opportunities for review of kinds of administrative action which the courts have held in the past to be non-reviewable; and also that, in spite of the apparently contrary tenor of its language, it will not be held to make "available" any forms of review procedure in situations where they have not been made "available" by the courts in the past. However, it is certainly to be hoped that in view of its language, history and obvious legislative purpose, the new Act will at least be regarded by the courts in doubtful cases as creating what may be called a presumption in favor of review. It seems entirely clear from

⁴⁸ What may well be regarded as a fifth limitation imposed on the right of review accorded by the act flows from the requirement of subsection 10(a) that a person, in order to be entitled to bring a review proceeding, must have suffered "legal wrong" because of agency action, or been adversely affected or aggrieved "within the meaning of any relevant statute." In interpreting this provision, the courts will almost certainly hold, as they have done in similar situations in the past, (a) that a review proceeding may not be brought "prematurely,"—i.e., before the administrative action sought to be reviewed is actually of such a character as to injure the applicant for review, and (b) that a person may not bring a review proceeding without showing injury to an interest which the courts will hold to be a "legal interest," or an interest "within the meaning of a relevant statute." If this interpretation of subsection 10(a) shall prove to be sound, the act will do nothing to extend review to cases where the courts have hitherto denied it, e.g., in such situations as *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 60 Sup. Ct. 869, 84 L. ed. 1108 (1940). On this point consideration should be given to the question of where the doctrine of the *Lukens* case ends, in view of *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, 60 Sup. Ct. 693, 84 L. ed. 869 (1939). In the light of the *Sanders* case, the point where the line is to be drawn may well depend upon the special provisions of the statute under which the administrative body is acting. This view would seem to be fortified by the inclusion in subsection 10(a) of the act of the words "within the meaning of any relevant statute."

the Congressional reports and debates, and especially from some of the language already quoted above, that Senator McCarran and Congressman Walter, who sponsored the bill in the Senate and the House, thought that its effect would be to broaden somewhat the opportunity for review of hitherto non-reviewable administrative acts, even though due respect was preserved for the appropriate limits upon review. In the light of this Congressional intent, the courts would certainly not be justified in giving to the Act a narrow and restrictive construction, but should rather treat it as authorizing, or indeed requiring, review whenever its language permits such a result. However, as has been pointed out above, the language of the Act is itself so restrictive at so many points that its effectiveness in broadening the field of review is extremely limited.

Accordingly, if the Act is to effect any improvement in administrative conduct through more effectual judicial review, it probably will have this effect only in so far as it operates to enlarge the scope and measure of review in those cases where the opportunity for review now already exists. This leads on to the second question propounded above, namely, do the provisions of the Act have the effect of broadening the scope or measure of the judicial review available for administrative determinations which were reviewable prior to the enactment of the Act?

III

The question of the scope of judicial review, and particularly judicial review of the facts, where the opportunity for review exists or has been established, was an issue which, as was seen in an earlier part of this paper, evoked more interest during the legislative pre-history of the Act, than the extension of the right to review to new cases. This was perhaps inevitable, since the former issue was one about which it was obviously easier to do something by the method of enacting general statutory language. The experience of the Walter-Logan Bill showed

the practical impossibility of extending the opportunity for review by a single statute to all the additional cases where it was regarded as desirable, while at the same time excluding it in those where it might be thought undesirable. The Walter-Logan Bill was criticized because its provisions seemed to confer a right of review of all quasi-judicial acts indiscriminately. The Administrative Procedure Act, by seeking to draw a line between those administrative acts which are to be reviewable and those which are not, has simply followed the course of least resistance, and has probably ended up by merely reaffirming the principles which the courts have followed without the aid of a statute. Does the Act do any more with respect to the scope of judicial review where the right of review exists? Does it in any respect widen the measure of that review, or does it again merely reaffirm what the courts have already decided, subject to all the limitations and qualifications which they have engrafted on basic principles?

Before attempting to decide this question in the light of the statutory provisions, it is desirable to note at the outset that paragraph 10(e) of the new Act, which is the paragraph prescribing the scope of review, is made applicable to all forms of review which are provided by special statutes no less than to those review procedures, if any, which have their sole source in the Administrative Procedure Act itself. This is because, as has been seen above, the new Act takes up and incorporates into itself all existing forms of statutory review and establishes these on a new basis in its own provisions. The clear effect of its provisions is to bring existing statutory review procedures under the coverage of the new Act, and thus make applicable to them those provisions of the Act which measure the scope of judicial review. With this preliminary statement as to the general applicability in all Federal review proceedings of the scope of review prescribed by paragraph (e), the provisions of that paragraph may now be examined.

Paragraph (e) contains two different types of provisions for measuring the scope of review. Provisions of the usual kind, which list the grounds on which the reviewing court may or shall set aside the determinations of the administrative body, are contained in the second sentence of the paragraph. This sentence is couched in mandatory and not permissive language and provides that the court of review shall set aside agency action, findings and conclusions in six different situations, three of which have to do primarily with questions of law, and the other three with questions of fact. The three situations in which the paragraph requires the reviewing court to set aside agency action on grounds of law are first, where the action is unconstitutional; secondly, where it is in excess of the statutory jurisdiction of the agency; and thirdly, where it was taken without observance of the legally prescribed administrative procedure. The three situations in which administrative action is required to be set aside because of some defect in its factual basis are, first, where it was arbitrary, capricious and constituted an abuse of discretion; second, where it was unsupported by substantial evidence; and, third, when "unwarranted by the facts" in those cases where the facts are subject to trial *de novo* by the reviewing court.

This specific enumeration of the grounds for reversal imposed upon the reviewing court constitutes the second sentence of paragraph (e). As the paragraph is drafted, this sentence of enumeration is not to be read alone. It is preceded by a sentence—the first of the paragraph—of more general instructions to the court, and is followed by a third sentence of like character. Presumably the instructions contained in these general sentences are to be followed by the reviewing court in the exercise of its duty to reverse administrative action in each of the six enumerated cases contained in the second sentence.

The first sentence of general instruction is as follows:

So far as necessary to decision and where presented, the review-

ing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action.

This sentence would seem to apply to those enumerated situations where the court of review is discharging its duty to reverse for alleged error of law.

The second sentence of general instructions, which appears as the third or last sentence of paragraph (e), is primarily applicable to those situations where the reviewing court is asked to reverse for error of fact. It reads as follows:

In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

In the light of this analysis of the three sentences constituting paragraph (e) which defines the scope of review, it may now be inquired whether the provisions of that paragraph, which are henceforth to be applied in all administrative review proceedings in the Federal courts, make any change in the rules hitherto applied by those courts, first, with respect to review of questions of law, and second, with respect to review of questions of fact. I believe that the conclusion which must be reached after such an inquiry is that properly construed the new statute does make a change in both particulars, and broadens in both instances the scope and measure of the review which the Federal courts are henceforth required to make of administrative action in cases where such action is reviewable at all. Since this conclusion differs from that reached by the Attorney General, who informed Chairman Sumners of the House Judiciary Committee that the Act does no more than declare the existing law concerning judicial review,⁴⁹ it is necessary to explain briefly the reasons for the view that paragraph (e) broadens the scope of review of both law and the facts.

⁴⁹ 92 Cong. Rec. at A3151 (June 3, 1946).

In the first place as to questions of law, paragraph (e) would seem by its first sentence to impose a clear mandate that all such questions shall be decided by the reviewing court for itself, and in the exercise of its own independent judgment. More explicit words to impose this mandate could hardly be found than those here employed, which recite that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action." The words last quoted seem to have a quite special significance shortly to be pointed out. Does this mandate that the reviewing court shall reach its own independent conclusions of law and apply them in testing the legality of administrative action go beyond the measure of review hitherto generally applied?

It is true that it has heretofore been generally understood that in a review proceeding questions of law are for the determination of the reviewing court. A very broad statement of this principle is contained in a classic passage of Mr. Justice Brandeis' concurring opinion in the *St. Joseph Stock Yards* case⁵⁰ where he used the following language:

The inexorable safeguard which the due process clause assures is . . . that there will be opportunity for a court to determine whether the applicable rules of law . . . are observed. . . . The order of an administrative tribunal may be set aside for any error of law, substantive or procedural. . . . There must be the opportunity of presenting in an appropriate proceeding at some time to some court every question of law raised, whatever the nature of the right invoked or the status of him who claims it.

This rule, however, has not received in its application the same clean-cut adherence from the courts which would correspond to its statement by Mr. Justice Brandeis. Increasingly, in recent years the Supreme Court has tended

⁵⁰ *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 72, 73, 77, 56 Sup. Ct. 720, 80 L. ed. 1033 (1938).

to treat many issues, which, when subjected to adequate analysis, would be seen to be issues of law, as lying within the discretion of an administrative agency and, therefore, non-reviewable. Beginning with the mandamus cases discussed above, this conception of administrative discretion as including a discretion to decide between doubtful rules of law has gradually permeated into other fields. The courts have begun to draw a distinction between two kinds of questions of law: those which involve what are sometimes spoken of as general law or legal principles, and others which involve the construction of technical terms and the application of knowledge thought to be expert and specialized. Where the legal question involved in a review proceeding is of the latter character, the courts have indicated an inclination in many cases not to review it, but to permit the administrative construction of law to stand. In these cases naturally everything turns on where the court chooses to draw the line between what is "general" and what is "technical," thus in effect leaving to the court's discretion the determination of whether it would or would not review a legal question.⁵¹

Perhaps the most outstanding recent instance of this attitude on the part of the United States Supreme Court is found in the leading tax case of *Dobson v. Commissioner*, 320 U. S. 489, 64 Sup. Ct. 239, 88 L. ed. 248 (1943), where the statute empowered the reviewing court to set aside an administrative decision not "in accordance with law." In this instance the administrative body, the Tax Court, had reached a conclusion on the ground that a certain transaction resulted in either a capital gain or a return of capital, and not an ordinary gain. There was no controversy as to the facts but merely as to the legal conclusions which should properly be drawn from them on this issue.

⁵¹ The writer had occasion to discuss this matter somewhat more fully before an Institute on Administrative Law and Procedure conducted by the American Bar Association, Sept. 13, 1940. The address was printed in (1940) 25 Minn. L. Rev. 588 and the passage relevant in the present connection is at 589-592.

The court, in an opinion which has been the subject of much subsequent comment,⁵² took the view that on a question of this kind it would not substitute its own judgment for that of the Tax Court, saying that technical and accounting problems were involved, and that

... when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand. . . . In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter.⁵³

It is submitted that such a position on the part of the courts will henceforth be hard to square with the specific language of the first sentence of paragraph (e) of Section 10 of the Administrative Procedure Act, if that sentence is given the effect which an objective reading of its words seems to require. The reviewing court is there not merely given the power, but the word "shall" is placed under an obligation, not only to "interpret constitutional and statutory provisions" but to "decide all relevant questions of law";⁵⁴ and then follow the additional words which impose

⁵² See, for example, Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis" (1944) 58 Harv. L. Rev. 70; Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact" (1944) 57 Harv. L. Rev. 753; Plumb, "The Tax Benefit Rule Tomorrow" (1944) 57 Harv. L. Rev. 675.

⁵³ 320 U. S. 489, 502; 64 Sup. Ct. 239, 247; 88 L. ed. 248 (1943).

⁵⁴ In a relatively recent article in (1944) 58 Harvard L. Rev. 70, Robert L. Stern discusses the Dobson case and Gray v. Powell, 314 U. S. 402, 63 Sup. Ct. 326, 86 L. ed. 301 (1941), in connection with the review of "mixed" questions of law and fact, and advances a rationale which, if adopted and judicially applied without sympathy for the legislative purpose, might largely eviscerate the guaranties intended and thought to be embodied in the Act.

Stern concludes that in reviewing administrative applications or interpretations of broad "technical" statutory terms ("producers" in the Powell case and "chargeable to capital account" in the Dobson case), judicial designations such as "inference of fact," "ultimate fact," "ultimate conclusion" and "mixed question of law and fact," resorted to for the purpose of holding non-reviewable the matter so designated, are but different modes of expressing the same thought. In his view this thought is that the first, if not the only, question of law presented is whether or not the legislature wanted the judgment or discretion of the agency on the matter in dispute. If this be answered in the affirmative, then it is said to follow that no other question remains for review,

on the reviewing court itself the further duty of determining "the meaning or applicability of the terms of any agency action." The explicitness of this additional language just quoted, coupled with its reference to "the meaning of the terms" of agency action, would seem henceforth to require the court in a review proceeding to look for itself at even those technical questions, whether they are regarded as law or fact, which are frequently involved in the "terms of agency action," and which the courts in recent years have tended to treat as more or less immune from judicial consideration.⁵⁵

even though, as in the Dobson case, there was no dispute whatsoever as to the facts. Stern concludes his discussion by commenting that "the duty of the court is to search for and apply the legislative will . . . and not to decide a question for itself whenever it calls for the promulgation of a rule of general application" (at 109).

Assuming the accuracy of Stern's surmise as to the thoughts of the judiciary, the act should have the effect of discouraging the indicated judicial use of such invocatory phrases as a means of expressing a conclusion that a particular agency function is "by law committed to agency discretion." If the provisions of sub-section 10(e) of the Act are interpreted in the manner undoubtedly intended by their authors—as explained *infra* herein—"inferences," "ultimate facts," and "mixed questions" are never any longer exempt from review *per se*, but are instead subject to the enumerated specific requirements of the sub-section. On the other hand, a direct and independent judicial decision of whether the agency function in question was "committed to agency discretion" might be made with relative ease, since the Act does not in terms establish standards for that determination.

The danger is that, in view of these considerations, the Stern rationale or some similar theory may now become the starting point for a reversal of approach, resulting in decisions denying review altogether by finding a legislative delegation of discretion as to the types of functions which, when exercised heretofore, gave rise to judicial application of the type of labels referred to above. Whichever view the reviewing court may take as to the issue presented, however, it seems clear from the legislative history that the technical nature of the question and the competence of the administrator are not sufficient under the Act to support the extension of "administrative finality" to the point reached by the Dobson case and decisions following it.

⁵⁵ Aside from these clear expressions in the Act itself, significant evidence of a legislative intent that administrative expertise shall not in the future constitute either directly or indirectly a ground for judicial abdication may be found in what Congress refused to say. In § 311(c) of their draft bill the minority of the Acheson Committee enumerated the specific questions of law and fact which might be raised on review, and immediately thereafter added the following proviso:

"Provided, however, That upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative

In the same way that the language of paragraph (e) seems clearly intended to broaden to the extent just indicated the scope of judicial review on questions of law, there is likewise shown by other language of the paragraph a clear intent to broaden similarly the scope of review on questions of fact. It is submitted that no other conclusion can properly follow from the third, or last, sentence of paragraph (e) when read in the light of the legislative history of the act and of the earlier bills which preceded it.

The relevant language is that the reviewing court, in making its determinations in the enumerated situations where it is under a duty to set aside an administrative finding, "shall review the whole record or such portions thereof as may be cited by any party." This language is to be read especially in connection with that part of the previous sentence which lays upon the court the duty of setting aside "agency action, findings and conclusions . . . unsupported by substantial evidence." These two parts of the statute when read together sum up into substantially the same result as that contained in the bill of the Acheson Committee minority which required the reviewing court to consider "findings, inferences or conclusions of fact unsup-

policy of the agency involved as well as the discretionary authority conferred upon it."

The Acheson minority bill was introduced in the 79th Congress as H. R. 1206, and the House Judiciary Committee heard testimony on it along with the bill which, as amended, became the Administrative Procedure Act. Although the Act adopts most of the judicial review provisions of the minority bill, the inclusion of the proviso quoted above seems never to have been seriously considered by Congress or its committees. It was not set forth or mentioned in the Senate Committee print of June, 1943, did not appear in the bills reported by either the Senate or House committees, and no subsequent reference to it or to any similar provision has been discovered in the recorded debates in Congress or in any other document reflecting the legislative history of the act.

Thus while even the Acheson minority proposal would in principle have restricted the doctrine of the *Dobson* case by requiring review of "all relevant questions" of law, the requirement could often have been easily satisfied, if not made illusory, by reliance upon administrative specialized skill and competence in matters of law, under the terms of the quoted proviso. It seems inescapable that in writing the Act Congress deliberately decided not to include a provision making possible in that manner a judicial failure to accord what Congressman Lea once referred to as an "honest-to-God" review. 83 Cong. Rec. 9096 (June 13, 1938).

ported, upon the whole record, by substantial evidence."⁵⁶ The intention and meaning of this language was in turn explained by the quotation from Dean Stason's testimony at the Senate hearings, set forth at an earlier point in this paper.⁵⁷ It there clearly appears that the purpose and intention of the third sentence of paragraph (e) of the judicial review section of the Administrative Procedure Act is to eliminate from judicial review of fact determinations not merely the scintilla rule but also that interpretation of the substantive evidence formula which would permit the reviewing court to examine only one side of the evidence. The purpose of the new provision, while not requiring the reviewing court to weigh evidence and substitute its own judgment for that of the administrative agency is to require it at least to look at the evidence on both sides and see whether the evidence in support of the administrative conclusion can fairly be regarded as substantial in the face of the evidence on the other side. This purpose was made explicit in the House Committee report

⁵⁶ REPORT at 246.

⁵⁷ This testimony, which is set forth in the text at p. 19, includes the statement that the Bradford Dyeing Association case presented "another interesting deviation from good practice." That "deviation" arose from the view that the judicial power to review facts did not apply to "inferences" drawn by the agency but was limited to a determination of whether the "underlying" facts were supported by substantial evidence. From 1940, when the Bradford case was decided, to 1944, when Medo Photo Supply Corp. v. NLRB, 321 U. S. 678, 64 Sup. Ct. 830, 88 L. ed. 1007, was decided, the theory that administrative inferences were not to be tested by the substantial evidence rule seems to have been firmly established in the decisions of the Supreme Court. In the Medo case, Chief Justice Stone, writing the opinion of the court, made the following significant comments in a footnote:

It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight . . . (at 681).

Under the language of sub-section 10(e) of the Act there would seem to be no longer any room for a less critical judicial inquiry into the propriety of inferences than into the basis for findings of the "underlying" facts, unless the drawing of the inferences in question is "by law committed to agency discretion." In this important respect also the Act would seem to enlarge the scope of review.

on the present bill, where the following language occurs:

The requirement of review upon "the whole record" means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.⁵⁸

Identical language occurs in the report of the Senate Committee.⁵⁹

Aside from these and similar unmistakable expressions of legislative intent, it seems entirely clear that language which differs as widely as that contained in the last sentence of paragraph (e) from the hitherto accepted formulae for fact review would not have been used, and that there would have been no reason or excuse for using it in the statute, if it was the intention of Congress by this paragraph to make no change in existing law but merely to restate it. The existing formulae confine themselves to the requirement either that the finding of the administrative agency shall not be "unsupported by evidence" or "shall be supported by substantial evidence."⁶⁰ The Administrative Procedure Act goes further. It does not content itself with a mere restatement of the "substantial

⁵⁸ Legislative History at 280.

⁵⁹ *Ibid.*, 214.

⁶⁰ For examples of how little evidence has been held by reviewing courts sufficient to support administrative decision, see: *Mado Photo Supply Corp. v. NLRB*, 321 U. S. 678, 64 Sup. Ct. 830, 88 L. ed. 1007 (1946), particularly Justice Rutledge's dissenting opinion; *Swayne v. Hoyt, Ltd. v. United States*, 300 U. S. 297, 57 Sup. Ct. 478, 81 L. ed. 659 (1937), particularly as to lack of justification for the contract rate system; *Booth S. S. Co. v. United States*, 29 F. Supp. 221 (D. C., S. D. of N. Y., 1939); and the observation of Chief Justice Stone, dissenting in *Bridges v. Wixon*, 326 U. S. 135, 178, 65 Sup. Ct. 1443, 1463, 89 L. ed. 2103 (1945), that "almost each week" the Court accepted administrative findings based on "tenuous support of evidence."

For apparent examples of judicial failure to examine the whole record, see, in addition to the cases cited above in this footnote; *NLRB v. Bradford Dyeing Ass'n*, 310 U. S. 318, 60 Sup. Ct. 918, 84 L. ed. 1226 (1940), particularly as to discharge of employees for participation in union activity; and *NLRB v. Waterman S. S. Corp.*, 309 U. S. 696, 60 Sup. Ct. 611, 84 L. ed. 1036 (1940), where Justice Black, speaking for a Court unanimously reversing the Circuit Court decision holding invalid a Board order, recited certain supporting evidence and then observed that the recitation was "not to say that much of what has been related was uncontradicted and undenied by evidence offered by the Company and by the testimony of its officers." (at 226).

evidence" rule; it adds a novel requirement when it says that the reviewing court in determining whether or not a finding is supported by substantial evidence "shall review the whole record or such portions thereof as may be cited by any party." This new and additional language must be given some meaning. What that meaning is should appear without further comment from the history of the various transformations of the review parts of the earlier bills discussed in the first section of this paper.

In final summary and conclusion, it may be said that if the review provisions of the Administrative Procedure Act are to be construed by the courts in an objective spirit and in such manner as to give effect to their intent and purpose, they should at least produce two results. First, they should make impossible a judicial refusal, as in *Dobbson v. Commissioner*, to consider independently so-called "technical" questions of law, and secondly, they should make impossible a judicial failure, as was apparently the case in *National Labor Relations Board v. Waterman Steamship Co.*⁶¹ and in *National Labor Relations Board v. Bradford Dyeing Ass'n*,⁶² to consider whether opposing evidence destroyed the apparently "substantial" character of evidence tending to support the administrative determination of fact.

DISCUSSION PERIOD

FEBRUARY 8, 1947

The Session Convened at 2:00 P.M.

QUESTION: I do not know whether I misunderstood as to the first two phrases of subdivision (c) of Section 10.

MR. DICKINSON: The first sentence of paragraph (c) of Section 10 falls into two parts. The first part says that where a statutory procedure is already available, the ad-

⁶¹ 309 U. S. 696, 60 Sup. Ct. 611, 84 L. ed. 1036 (1940).

⁶² 310 U. S. 318, 60 Sup. Ct. 918, 84 L. ed. 1226 (1940).

ministrative action shall be reviewable. It reads, "Every agency action made reviewable by statute," and applies where you have already got some special statutory review procedure. The second part of the sentence says, "Every final agency action for which there is no other adequate remedy in any court."

QUESTION: As I understood you, there seemed to be no right of review unless it was already in existence at the time this Act went into effect.

MR. DICKINSON: No, I did not say that or did not mean to say that. I said that laying aside those agencies' actions for which there is a special statutory review procedure, that is the first part of the sentence, this Act creates a right of review for every final agency action for which there is no other adequate remedy in any court. But in creating that right, of course, it is subject to the limitation imposed by certain other language in the section. One is that the statute must not preclude judicial review. Another is that the action must not be committed to agency discretion. Also there must be an applicable form of legal action. Next, there must be no other adequate remedy in any court. Those were the four limitations that I attempted to discuss which this Act interposes on the right of review which it creates by the second clause of the first sentence of paragraph (c).

QUESTION: As I understood you, the only case in which you thought it might be effective was where it might be attacked collaterally. For example, where a man was to be punished or was deemed on trial.

MR. DICKINSON: I did not intimate that such a collateral attack proceeding would be given by or grow out of the second clause of the first sentence of paragraph (c). I said that where there was such a right of collateral attack, that might preclude any action springing up by virtue of the second clause of the first sentence of paragraph (c).

MR. BENJAMIN: As I explained to the Chairman previously, this is not exactly a question and that is because I, at the time, thought that Mr. Dickinson's talk was so admirable and clear and I agree with it so entirely I really have no questions to ask.

DEAN VANDERBILT: You just endorse it. Let the record note that.

MR. BENJAMIN: The point that I wanted to make was one of New York local pride. I think, on this question of the whole record, that the New York Court of Appeals is entitled to priority because it brought out the whole record substantial evidence doctrine—I believe, back in 1940, in the case of Stork Restaurant against Boland about 282 N. Y. The opinion there is quite explicit but the argument in the Court of Appeals was even more explicit and I thought it would be worth recounting very briefly, because it illustrates so well the scope of review about which Mr. Dickinson was talking.

That was an appeal by the State Labor Board to the Court of Appeals and Ralph Seward, Counsel for the Board, argued first. After he had been arguing twenty minutes or so, Judge Lehman said, "Mr. Seward, you have recounted to us evidence in support of the Board's finding that appears to be substantial. I suggest that you now permit the respondent to argue, because the question for this court is whether, against the background of the respondent's evidence, your evidence remains substantial."

That was the scope Mr. Dickinson was advocating and it is my local pride that the Court of Appeals actually handed that down as doctrine six or seven years ago.

DEAN VANDERBILT: I must confess as a member of the minority that I do not think any of the minority were aware of that decision. But I will say that when we were trying to draft what we called a concurring report (everyone in the law likes to find a plaintiff and a defendant so

we promptly became the majority and the minority), we groped around for some phrase or group of words which would put an end to this numbo-jumbo business of having a court say, "We find substantial evidence," but without saying anything of what they found on the other side. After four or five days of phrase seeking, we finally hit upon that one and it is certainly very comforting to know that we have high precedent. I have a notion that we are going to need all the controlling and persuasive argument that can be found to prevent development of the other meaning.

QUESTION: Mr. Dickinson, do you not think, in spite of what you have analysed as the substantial evidence rule on the record, that the courts will continue to draw distinctions between different administrative agencies and different types of records that may come before them? For example, in tax cases, don't you think they are going to continue to follow the Dobson rule?—whether or not the court is considered an agency is another question. That in rate cases they will probably continue to follow the present substantial evidence rule rather than infer that the Administrative Procedure Act was intended to enlarge this scope of review? That they will be more or less traditional in their approach in cases where they are reluctant to review the findings of what they consider experts in the field?

MR. DICKINSON: If you have ever driven an automobile over a frozen road in winter time, you realize as you have indicated, that the natural tendency is to slip back into whatever rut has already been made in the road. I take it that is also what Dean Vanderbilt referred to a moment or two ago when he said that is is going to require some effort to get the courts out of their ruts if they are going to get out of them at all.

But that again comes down to the attitude the court is going to take towards the will of Congress. You have a statute here which was passed by Congress and which, as

I pointed out at the very close of my talk, uses some new language. It is hard to explain why that new language was used if it was not for the purpose of indicating to the courts that Congress desired them, at least to some extent, to get out of the rut that they were already in.

On the technical point that you raise about giving way to the special expertness of the body in technical matters, you may remember that in the minority bill of the Acheson Committee which Dean Vanderbilt referred to, there was some language at the end of the judicial review section which buttered up the expert bodies and said that the court should attach great weight to expert judgment and so on. A good many people got rather excited about it and said such statements were taking away with one hand everything that was given with the other hand in the earlier part of 10(e). So the language went out, or at least it did not appear in this bill which eventuated into the Act.

I do not know what more Congress could have done to intimate to the courts that it wants them to make a little change in their ways, but not too much of an innovation. Of course, if the court prefers not to listen to what Congress has told it, there is nothing very much that can be done about it. You recall the old remark which has a good deal of soundness in it, "He that has the last word in interpreting the law has the power to make the law." If the court wants to nullify this Act they are at their entire liberty and have the power to do so.

DEAN VANDERBILT: But is not there also some force that might be urged to see that they do not fall in a rut by reference to the debates in both Houses of Congress, in which members of both parties said rather definitely, "Well, I'm going along with this because I think it is an improvement but if it does not work out the way I think it is going to work out, you are going to hear from me and the rest of us again." There is that whole atmosphere

that, unless it works, this is not the final word on the subject, which I think adds not only precedent, but words of warning which will doubtless be cited by counsel to the court in discussing the legislative history.

MR. DICKINSON: I think the legislative history, as Dean Vanderbilt indicates, is pretty plain on this point. But as he also indicates, we are at the moment in a period which certainly calls for vigilance and not for a relapse into the notion that everything has now been accomplished and that whatever the court does will be accepted. In other words, if the language used is not strong enough to get across to the court what ought to be done, there is no doubt of the possibility of stronger language if it should be required.

QUESTION: Mr. Dickinson, after the court looks at the whole record for evidence on both sides of the question, how should it test the agency's conclusion? In other words, is the agency's conclusion to be affirmed if it is reasonable on the whole record?

MR. DICKINSON: I do not think that a great deal of difficulty is involved there. In other words, the word "substantial" is a word which has an element of the comparative about it; something that is very small may be substantial as compared with nothing at all on the other side. On the other hand, something that is two inches long may not be very substantial compared with something that is one hundred inches long on the other side. I do not think that the whole record formula requires the court to balance the evidence where it begins to get close. Then, if there is a lot of evidence on one side and a lot of evidence on the other side, then the appropriate and sound application of the substantial evidence rule is to uphold the administrative body. But if the administrative body has only a little bit of evidence compared with a good deal of evidence on the other side, then you can argue that that is not substantial and I think that is the way that the argument would have to run.

QUESTION: The Act provides that a court shall hold unlawful and set aside agency findings. May it also modify them?

MR. DICKINSON: There has been a good deal of doubt, and I think a good deal of rather unsound speculation, on the matter of the right of the courts to modify findings. This doubt has grown out of the decision of the Supreme Court in two or three cases coming up from the District of Columbia several years ago, the *Pep Co.* case and the radio case, in which the Supreme Court held that a constitutional court, sitting under Article 3 of the Federal Constitution, could only exercise judicial and not administrative powers, and that when a court modified findings which involved a point of administrative discretion it was exercising administrative powers and that could not be done by a constitutional court.

Some lawyers understood that decision to go so far as to mean that a constitutional court could not review the facts as found by an administrative body. Back in the early discussions in the Bar Association and in this Special Committee on Administrative Law you will find a lot of what has always seemed to me to be rather unnecessary worry as to whether you could ever require the courts, or even authorize a constitutional court, to review on questions of fact.

I do not know whether it was a survival of that fear which led to the dropping out of the power to modify in this statute or not. But it may well have been. It may well have been thought that if a court were given power to modify on the facts the determination of some kinds of agencies, that would be held to be an exercise by the court of an administrative rather than a judicial function. Therefore they got rid of the difficulty by merely omitting it. I do not know. That is just a guess. Maybe Dean Vanderbilt knows something about it.

DEAN VANDERBILT: I do not know the answer.

QUESTION: What about modification of agency action, such as when the FPC says to a person, "Cease and desist from doing A, B, C, D," and the Circuit Court says "We modify 'D' in certain steps." Is that precluded by this Act now?

MR. DICKINSON: I would not think so because I would think that all the powers which are given under special statutes still exist and that this Act simply builds up on top of them. I would not think that the Act repeals any powers of review that are given in excess of what it states. I think that would be in accord with the normal principles of statutory construction—that you cannot take away something that already exists without expressly doing so.

QUESTION: This is really a question for Dean Vanderbilt rather than Mr. Dickinson. I was wondering, when your group was casting about for language for the review section, why you came up with substantial evidence rather than with the weight of the evidence rule?

DEAN VANDERBILT: For the very reason that General Dickinson suggested a minute or two ago. No one would want to put the burden on the courts in reviewing the action of administrative tribunals to survey the whole record, which would be precisely what you are up against if you get into the weight of the evidence. It really calls for them to take the entire record instead of just taking something short of that.

To use the weight of the evidence rule would be the acme of perfection. With the volume of work that they have, particularly in the federal courts, it would be impossible. Now, I do think there are a considerable number of state courts who practically invoke that rule when reviewing administrative action. The volume of business in those courts is not so great that they are unable to do it. But clearly, in the federal courts it would have meant a breaking down of the machinery.

QUESTION: General Dickinson, the general conclusion I think, as I stated, was that judicial review had not been broadened substantially by this Act. Did I understand you correctly?

MR. DICKINSON: No. I said that I did not think that the provisions of the Act relating to the opportunities of review, the types of administrative action which were subject to review, had been broadened. In other words, I could not think of many cases or, indeed, of any cases where under this Act there would be a right to have a review of an administrative act that you could not have a review of already without this Act. I felt that Section 10(e) enlarged the measure of the review to which you were entitled, both on questions of fact and on questions of law; that it removed the restriction on the review of questions of law that existed by virtue of such a decision as the Dobson decision, and other decisions of that kind; and that it removed the restriction on review of the facts which resulted from those decisions that interpreted the substantial evidence rule in a very narrow sense as constituting merely a modified scintilla rule. So that the operation of Section 10(e) was to give you a somewhat broader scope of review, both on the law and on the facts, which you would not have been entitled to before this Act was passed.

QUESTION: And then in addition to that there is, of course, the Act itself, which now forms a basis for judicial review, that is the agency has conformed with the requirements?

MR. DICKINSON: Yes. I did not go into that. Of course one of the grounds of judicial review is whether or not the agency has conformed to these procedural requirements that are set up by the earlier sections of the Act. That is specifically set out as one of the enumerated grounds of review in the middle sentence of paragraph (e).

QUESTION: Falling short of statutory right?

MR. DICKINSON: That is right.

QUESTION: And more specifically, I think, the hearings provision would probably be one of the large sources. I was also wondering whether under the evidence provision, Section 7(c), there are not just the germs of something even larger? I notice that the Act calls for the agency to have rules providing for the exclusion of irrelevant and immaterial evidence. I am just wondering whether there is any real point to a distinction between substantial evidence on the one hand and substantial, material and relevant evidence on the other hand?

MR. DICKINSON: I think that the reviewing court, acting under paragraph (e) gets its own sailing directions, so to speak, from the language of paragraph (e). In other words, it has the record before it and what it is to do with respect to fact determinations based on that record is to be found within the four corners of paragraph (e) in my judgment.

Of course, if the charge is made that the agency, in receiving evidence or in drawing conclusions in evidence or something of that kind, violated a mandate of paragraph (c) of Section 7, that, I should think, would possibly be reviewable under subdivisions 1 or 4 of the middle sentence of paragraph (e) of Section 10. In other words, you might lay as a special instance of error that the administrative body received the wrong kind of evidence or something of that sort as being a violation subject to review under subdivision 4 of the middle sentence of paragraph (e); I do not know. I have not gone into that point with any degree of thoroughness.

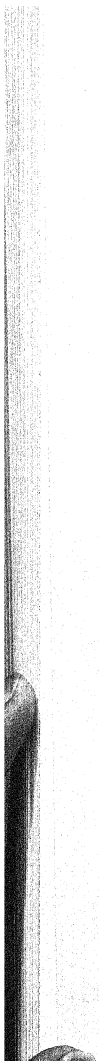
QUESTION: Mr. Dickinson, do you think that the scope of judicial review of the facts, as substantial evidence was defined, for example, in the Consolidated Edison case, is not in essence the scope of review that was intended to be defined under Section 10(e)?

MR. DICKINSON: No, I do not think the Consolidated Edison case went as far as Section 10(e) was intended to go and, of course, the Consolidated Edison case was clipped down by some of those subsequent cases that were referred to in the Senate hearings. I think at that time (in 1937 or 1938) when the draftsmen were referring to the Consolidated Edison case, they were a little timid.

There is another phase of the history that I did not emphasize here. It may be appropriate to refer to it now. Back in the early days prior to 1937 and 1938, the thinking of some of those who were concerned with this matter for the Bar Association ran in an entirely different line, a line which, in the end, proved to be unfruitful. Their thinking was running in the line of the first series of so-called Logan Bills, where the thought was that the real problem was not the problem of judicial review but rather the problem of getting these fact matters decided by a more adequate machinery either in the agency itself, or in what was called an Administrative Court, which was not a reviewing court at all. I think that when the draftsmen first began on the 1937 bill and the 1938 bill, the same emphasis was not put on judicial review of the facts that was afterwards felt to be necessary, by virtue of a loss of confidence in the degree of improvement that could be effected by improving procedure within the agency.

DEAN VANDERBILT: In concluding this Institute I want to thank all the speakers who have contributed so much and also the audience which has likewise contributed by very intelligent questions.

I think we have gone far enough to see that this statute of relatively few pages has a lot more in it than one would gather at first glance. I think there are a number of lawyers who do not dream of it yet but who will have to go to school on this Act, even if they do not know it. It is also possible that a few judges may find it necessary to devote some time to a study of the Act and this subject.



APPENDIX

ADMINISTRATIVE PROCEDURE ACT

AN ACT To improve the administration of justice by prescribing fair administrative procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE

Sec. 1. This Act may be cited as the "Administrative Procedure Act."

DEFINITIONS

Sec. 2. As used in this Act—

(a) **Agency.**—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) **Person and Party.**—"Person" includes individuals, partnerships, corporations, association, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) **Rule and rule making.**—"Rule" means the whole or any part of any agency statement of general or particular applicability

and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and adjudication.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and licensing.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) Sanction and relief.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) Agency proceeding and action.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) **Rules.**—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) **Opinions and orders.**—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) **Public records.**—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

RULE-MAKING

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) **Notice.**—General notice of proposed rule-making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include

(1) a statement of the time, place, and nature of public rule-making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) **Procedures.**—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) **Effective dates.**—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) **Petitions.**—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign-affairs

functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) Notice.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) Separation of functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) **Declaratory orders.**—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

ANCILLARY MATTERS

Sec. 6. Except as otherwise provided in this Act—

(a) **Appearance.**—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) **Investigations.**—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) **Subpenas.**—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the

appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(d) Denials.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

HEARINGS

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) Presiding officers.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Hearing powers.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) **Evidence.**—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) **Record.**—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) **Action by subordinates.**—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of

the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its function imperatively and unavoidably so requires.

(b) Submittals and decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SANCTIONS AND POWERS

Sec. 9. In the exercise of any power or authority—

(a) In General.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) Licenses.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public

health, interest or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

JUDICIAL REVIEW

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) **Right of review.**—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) **Form and venue of action.**—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) **Reviewable acts.**—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory

order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) **Interim relief.**—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) **Scope of review.**—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

EXAMINERS

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and

shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts.

CONSTRUCTION AND EFFECT

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

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